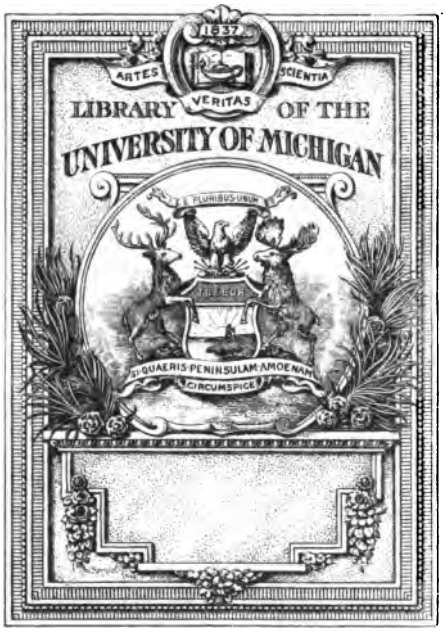
CASES ON RESTRAINT OF TRADE IV.

WYMAN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CASES ON RESTRAINT OF TRADE
IV

IN PART A SELECTION FROM

CASES ON PRIVATE CORPORATIONS

BY

JEREMIAH SMITH

Story Professor of Law in Harvard University

SECOND EDITION

EDITED BY

BRUCE WYMAN

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CHAPTER IV. — CONSOLIDATION.

SECTION I. — WITHOUT CENTRAL INCORPORATION.

A. Pooling Agreement.

WHITTENTON MILLS *v.* UPTON.

Supreme Court of Massachusetts, 1858.

[10 *Gray*, 582.]

Petition by a manufacturing corporation to set aside proceedings in insolvency, instituted against the corporation and William Mason, as partners, upon Mason's petition; also to restrain the assignees appointed under those proceedings from further interfering with their estate; and to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations.

The following facts appeared by the report of a special master in chancery: —

The Whittenton Mills were incorporated by *Statute* 1836, chapter 19, for the purpose of manufacturing cotton goods. Before 1850, an agreement of copartnership was entered into between the Whittenton Mills and W. Mason. This partnership, under the firm name of William Mason & Company, carried on an extensive business in the manufacturing of machinery for cotton mills; afterwards adding the business of manufacturing locomotive engines. Mason contributed to the copartnership nothing but his skill and patent rights. The Whittenton Mills contributed all the capital required. In 1857 the Whittenton Mills, which had continued the business of manufacturing goods, and the said firm of William Mason & Company, both became insolvent. Prior to that time the general agent of the Whittenton Mills represented to third persons, with whom the firm of William Mason & Company were dealing, that the corporation was a member of the partnership. The nature of the business in which Wm. Mason & Co. were engaged, and the manner of conducting it, were throughout known to all the officers of the corporation; and to all the stockholders except one, who was the owner of four shares from the time of the organization until 1854, when he transferred them to one of the other stockholders.

S. Bartlett, and *B. R. Curtis*, for the petitioners. 1. A manufacturing corporation, created by a law of this State to carry on business therein, pursuant to the Rev. Sts. *cc.* 38, 44, cannot enter into a general copartnership with either a natural person or another corporation, even for the prosecution of the same business for which it was chartered. The powers of a corporation are only those expressly granted, and those implied, because needful, or, perhaps, usual and customary, for the ends which the corporation was created to attain. *Salem Milldam* v. *Ropes*, 6 Pick. 32. *Beatty* v. *Knowles*, 4 Pet. 166. Angell & Ames on Corp. §§ 229, 239, 256. The power to form a general copartnership is neither expressly granted, nor needful to transact the business of manufacturing.

The entire legislation of the State for the regulation of manufacturing corporations proceeds upon the assumption that each corporation will conduct its own several affairs separately, by means of its own duly appointed officers and agents, acting in the name and behalf of the corporation; and its interests and affairs cannot be committed to a partnership, and conducted under the rules and principles which govern partnership business and liability, without violating the public policy of the State, exhibited by its legislation, and removing the safeguards erected for the security of those who may become creditors of the corporation. Rev. Sts. *c.* 38, §§ 1, 2, 22, 25. In a partnership, the individual partner, (in this case Mason,) might do anything, within the scope of the business, not only without the concurrence of the directors, but against their will.

[Remainder of argument omitted.]

E. R. Hoar, and *H. Gray, Jr.*, for the assignees. 1. A corporation has the same power as a natural person to make all contracts not prohibited by law, and which are necessary or usual in transacting the business which it is authorized by law to transact. The power to make a contract of partnership is not a distinct corporate power, to be created or conferred only by a special grant; but, like the appointment of an agent — and each partner is, as between themselves, an agent of the other — is only one mode or instrumentality of effecting the lawful objects for which the corporate powers were given. A corporation therefore may form a contract of copartnership to effect any purpose which it may lawfully accomplish by other means, agencies, or instrumentalities. Angell & Ames on Corp. §§ 95, 96, 271, 272. *Canal Bridge* v. *Gordon*, 1 Pick. 304, 307. *Peckham* v. *North Parish in Haverhill*, 16 Pick. 287. *Old Colony Railroad* v. *Evans*, 6 Gray, 38, 39. *Catskill Bank* v. *Gray*, 14 Barb. 479. *Catskill Bank* v. *Hooper*, 5 Gray, 584, 585. *Conkling* v. *Washington University*, 2 Maryland Ch. 508. *Shrewsbury & Birmingham Railway* v. *London & Northwestern Railway*, 17 Ad. & El. N. R. 663, 665, 2 Macn. & Gord. 353, and 6 H. L. Cas. 135. *Great Northern Railway* v. *South Yorkshire Railway & River Dun Co.* 9 Exch. 642.

This case falls within the principle upon which congress has been

held to have the power to incorporate a bank, although no such power is expressly granted, and the Constitution declares that all powers not delegated are reserved. 1 Kent Com. (6th ed.) 249–254.

The Whittenton Mills are shown to have made and acted under agreements of copartnership with William Mason. "Trading corporations are affected, like private persons, with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally, by those legal and equitable considerations, which affect the rights of natural persons." *Melledge* v. *Boston Iron Co.* 5 Cush. 175.

[Remainder of argument omitted.]

THOMAS, J. This is a petition to this court, sitting in equity, and as such having, by the *St.* of 1838, *c.* 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated, if the corporation was capable in law of entering into and forming such partnership and for such ends.

But the petitioners say, first, that the Whittenton Mills could not enter into any legal partnership; secondly, that if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created; thirdly, that if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason and under the *St.* of 1838, *c.* 163, and the acts in addition thereto; such acts respecting only natural persons and making no provision for bodies corporate.

At the threshold of the cause and of its elaborate discussion is the question, Was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: Has a corporation, as one of its usual inherent powers, the capacity to form a contract of copartnership? The narrower question, but for this case the practical and pertinent one, is, Can a manufacturing corporation in this commonwealth, incorporated since February, 1831, and subject to the provisions of the thirty-eighth and forty-fourth chapters of the revised statutes, enter into a contract or society of copartnership?

This corporation was created in March, 1836, as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges, and made subject to all the duties, restrictions, and liabilities set forth in the thirty-eighth and forty-fourth chapters of the revised statutes, passed on the fourth of November preceding, but not to take effect till the first of May, eighteen hundred and thirty-six. *St.* 1836, *c.* 19. This charter, with the provisions of the chapters referred to

and made part of it, is the origin and source of the powers and functions of the corporation. What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If then this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of *c.* 38 of the Rev. Sts. provides that the business of every such manufacturing corporation shall be managed and conducted by the president and directors thereof, and such other officers, agents, and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company and to bind the corporation by his acts is vested in one not a member of the corporation nor its officer or agent. Such are the third, fourth, and fifth sections, providing how the president and directors, and other officers, agents, and factors of the corporation shall be chosen. Such too is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the limit fixed by law, or to reduce it. §§ 9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation; the means of stating which would not be in their power if another principal had the power of creating the debts. § 22. Of the same character is the twenty-fifth section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess; a provision evidently based upon the ground that the exclusive power to contract

debts is vested in such directors, and that they cannot be divested of it, and which is wholly inconsistent with the existence of a power in the corporation to enter into a contract of partnership, by which another principal would be created, having equal power to contract debts and to bind the partnership and the corporation *in solido*.

Indeed the effect of all our statutes, the settled policy of our legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a manufacturing corporation under the legislation of the Commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the *St.* of 1852, *c.* 195, not adverted to in the argument, corporations created for the manufacture of woollen and cotton goods are authorized to carry on certain other manufactures, but this only when four fifths of the stockholders shall, by vote at a special meeting called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered, did not exist before the statute was passed.

We are therefore all of opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void.

It is said however by the respondents that if this be so, such violation of the charter can only be alleged by the Commonwealth upon proceedings for a forfeiture of the charter, and that the validity of the partnership cannot be called in question by the corporation or by its creditors or debtors.

As the basis of proceeding against the Whittenton Mills in insolvency upon the petition of Mason under the *St.* of 1838, *c.* 163, § 21, even supposing that the provisions of that statute are not limited to natural persons, it was necessary to show the existence of an actual

copartnership between Mason and the corporation. It was not sufficient to show that they had so conducted as to be liable to third persons as partners; they must be partners *inter sese*. *Hanson* v. *Paige*, 3 Gray, 239. There must be a contract of copartnership between them. Into such a contract the petitioners were incapable of entering.

But the case rests upon broader grounds. The charter of the corporation is part of the public law. Rev. Sts. *c.* 2, § 3. Those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership; that that contract was beyond the scope of its authority, and that this incapacity resulted from considerations not personal or peculiar to this corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and, while it imposes upon the stockholders of the corporation heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs.

The precise point at issue before us is the validity of these proceedings in insolvency. That depends, as before remarked, upon the existence of the partnership between the Whittenton Mills and Mason. Upon that only could the petition of Mason be sustained.

It is not necessary for this purpose to decide how far these considerations will affect those claiming to be the creditors or debtors of the alleged partnership. It is in this point of view only, that the cases of *Chester Glass Co.* v. *Dewey*, 16 Mass. 94, *Quincy Canal* v. *Newcomb*, 7 Met. 276, and *White* v. *South Shore Railroad*, 6 Cush. 412, can be deemed material. They have the tendency to show the existence of a contract between the Whittenton Mills and Mason, which the former is estopped to question.

In the case of *Chester Glass Co.* v. *Dewey*, one ground of defence to the recovery for goods sold and delivered by the plaintiff corporation was, that the corporation was prohibited from trading. The court held, that the legislature did not intend to prohibit the supply of goods to those employed in the manufactory. That certainly was the end of the matter. The court however added, that the defendant could not refuse payment on this ground, but that the legislature may enforce the prohibition by causing the charter to be revoked. This suggestion will be entitled to consideration if a question should arise as to the right of the alleged company to recover for goods sold, but it certainly is not conclusive upon the relation of the partners *inter sese*.

In *Quincy Canal* v. *Newcomb*, it was held, that, where a canal was opened and toll claimed and the defendant used the canal, he was liable to the payment of such toll and could not avoid such payment by showing that the canal had not been made so deep as the statute required.

In *White* v. *South Shore Railroad*, it was held, that the defendants

were liable for damages in constructing their road through and across a mill pond authorized by the general court to be raised in a navigable river, though in erecting the dam for raising the pond the condition of the act permitting it had not been complied with. The court said, that the railroad company could not take the petitioners' pond from them because the dam was not constructed in compliance with the act; that whether it had been so constructed was a matter between the government and the petitioner.

If the assent of all the stockholders were shown to the formation of the partnership — which is not the fact — it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provision of the insolvent law of 1838, *c.* 163, and the acts in addition thereto.

The proceedings in insolvency founded upon the petition of Mason as the partner of said Whittenton Mills under the firm of William Mason & Company were illegal and must be vacated and set aside, so far as they affect the estate of the Whittenton Mills. A mandamus must issue to the judge in insolvency for the county of Bristol to proceed upon the petition of the Whittenton Mills, to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

BATES *v.* CORONADO BEACH CO.

1895. 109 *California*, 160.[1]

APPEAL by the Coronado Beach Company from a judgment of the Superior Court of San Diego County.

The plaintiff brought this action against the defendant for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate.

The facts as found by the Court were substantially as follows:

The plaintiff and the appellant entered into a contract by which it was agreed that they should purchase certain lands and other property from the Millers, sell the same, pay certain debts and encumbrances

[1] Statement compiled from opinion in this case and from opinion in previous report of same case under the name of *Bates* v. *Babcock*, 95 Calif. 479. Only so much of the opinion is given as relates to a single point. — ED.

thereon, and divide the profits and losses arising therefrom equally between them. Both of the parties to the agreement immediately entered upon its performance, and carried it out according to its terms. The plaintiff gave to the defendant the fifteen thousand dollars which was his contribution to the venture, and transferred the title to the land then held by him [as trustee for the Millers] to the person designated by the defendant [one Hubbell, secretary of the Coronado Beach Company], and the defendant disposed of the money in discharging obligations upon the land, and afterward disposed of the land. One purpose for which the Coronado Beach Company was incorporated was the selling or otherwise disposing of lands.

In the Superior Court judgment was rendered against the Coronado Beach Company.

Gibson & Titus, for appellant.

Clarence L. Barber, and *J. W. Hughes*, for respondent.

HARRISON, J.

. . . . . .

It was not *ultra vires* for the appellant to enter into the agreement with the plaintiff. The power of a corporation to enter into a general partnership with an individual, or with another corporation, is not here involved. The ground upon which this power is sometimes denied is that a partnership implies the power of each partner, under his authority as a general agent for all the purposes of the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation exists require its powers to be exercised by a board of directors, and preclude it from becoming bound by the act of the one who may be only its partner. There is, however, in the present case no question of agency in the management of the affairs of the corporation. The plaintiff paid the money to the appellant, and transferred to its appointee the title to the land, so that the entire management of the business contemplated by the contract was intrusted to the corporation itself. There is no rule of law that will preclude a corporation from entering into a contract with an individual, which will have the effect to carry out directly or indirectly the object of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties. Section 354 of the Civil Code provides: "Every corporation, as such, has the power: . . . 8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation."

[Remainder of opinion omitted.]

Judgment and order affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

BOYD *v.* AMER. CARBON BLACK CO.

1897. 182 *Pa. State*, 206.[1]

BILL in equity by Boyd against the defendant corporation; alleging (among other facts) that a partnership was entered into and carried on for a time between plaintiff and defendant; praying (*inter alia*) that an account be taken of all the rents, royalties, and profits properly due plaintiff; that the partnership be dissolved, and an account be taken; that a receiver be appointed to take charge of the partnership property, books, and business; and that the defendant be decreed to pay whatever balance was found due.

Defendant demurred, on the ground: that no such partnership as averred by plaintiff could be lawfully entered into by a corporation; therefore equity would not take jurisdiction, either to decree dissolution, an account, or the appointment of a receiver.

The court below sustained the demurrer and dismissed the bill. Plaintiff appealed.

Eugene Mullin, for appellant.

George A. Berry, for appellee.

DEAN, J.

. . . . . .

Of course, the demurrer admits the truth of the averments in plaintiff's bill. We have, then, the facts that the contracts of partnership were made by the plaintiff with the corporation of which he was a stockholder and director and a gross violation by defendants, not only of the contract of partnership, but of the contracts made with him for the purchase of gas from his premises by the partnership. The principal reason given by the learned judge of the court below for sustaining the demurrer is that the contract of partnership by the corporation was ultra vires; that no corporation has authority to share its corporate management with natural persons, in a partnership. And for this ample authority is cited, and the rule cannot be questioned. But, conceding the full force of this rule, does it deprive the plaintiff, on the facts, of all remedy in equity? Assume that the partnership has not now and never had a legal existence; that is only because one of the partners had no power to enter into it; but, while it had no legal existence, it had one in fact; and the other partner fully performed; the corporation had the full benefit of the contract up to the time it concluded that it was more profitable to violate its agreements. Beach on Corporations, sec. 842, says: "It may be considered prima facie ultra vires for an incorporated company to enter into a partnership with other persons;" but, all the authorities hold

[1] Statement abridged. Arguments and part of opinion omitted. — ED.

that, notwithstanding the prima facies, if it be shown that the other partner had fully performed his obligations under the contract, this plea will not avail. "A corporation may not avail itself of the defence ultra vires when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the performance and of the contract:" 27 Am. & Eng. Ency. of Law, 363; Morawetz on Corporations, sec. 689; *Wright* v. *Pipe Line Co.*, 101 Pa. 204; *R. R. Co.* v. *Transportation Co.*, 83 Pa. 160.

Taking, as we must, every material averment of plaintiff's bill as an admitted fact, the defence, if it should prevail, would work a palpable injustice. While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life, in fact, for a single day, every principle of equity commands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed. The contract is not malum in se, but only malum prohibitum; it was illegal, but not iniquitous. If the corporation has had the benefit of $15,000 paid by Boyd for the construction of the second plant, has received the proceeds of the manufactured product, has used and continues to use his gas, it ought to and must account. It is wholly immaterial whether the partnership be declared dissolved because it is illegal to carry it on, or it be declared at an end in fact, because of want of power on part of the corporation to enter it; in either case the plaintiff is entitled to his property in possession of the defendants, and whatever money they have received more than their share. As they allege that the contracts with plaintiff were illegal they can claim no rights of possession of the whole partnership assets and plaintiff's property under them, and must deliver them up to be cancelled.

. . . . . .

It is, therefore, directed that the decree of the court below sustaining the demurrer and dismissing the bill be reversed, and that plaintiff's bill be reinstated and taken pro confesso. Further: that the partnership, which was in fact entered into and carried on between plaintiff and defendants, under the three several agreements marked exhibits A, B, and C, be declared at an end, and that said contracts be surrendered by defendants for cancellation; that an account be taken of all the rents, royalties, income, and profits due plaintiff from said defendants, according to said contracts; that all the business of said partnership in fact be wound up, and all the assets of the same be turned into cash, and an account be then stated between the parties, and distribution of the cash be made as in and by the said contracts the parties have a right to demand, and that proper decrees for enforcing payment according to said distribution be made on the parties by the court below. It is further directed that under the equity rules a receiver be appointed by the court below, to take into his possession the in fact partnership property, books, and accounts, to the end that

a settlement may be had of its business; and that such further and other decree or decrees be entered by the court below as will promote equity between the parties, in accordance with this opinion.

It is further ordered that the appellee pay the costs of this appeal.

SABINE TRAM CO. *v.* BANCROFT *et als.*

1897. 16 *Texas Civil Appeals*, 170.[1]

SUIT, by a corporation, to recover damages incurred by reason of the breach of a contract entered into between it and the defendants, whereby the parties agreed to associate themselves as copartners in the business of manufacturing and selling pine lumber. The corporation agreed to furnish sufficient pine logs to operate and run the sawmill of the defendants, who agreed to furnish for the partnership the use of their steam sawmill for the purpose of sawing the pine logs into lumber. There were also stipulations as to the mode of paying the corporation for logs furnished by it; as to the purchase of logs by the partnership from outside parties; and as to an annual division of partnership profits. By the agreement the partnership was to continue for three years from Jan. 8, 1893. Plaintiff alleged that, on Nov. 1, 1893, the defendants refused to operate the mill or to receive any logs which the plaintiff could have furnished; and that, on Dec 23, 1893, the defendants withdrew from the contract. The damages sought to be recovered are the profits that would have accrued to the plaintiff by the sale of the logs from Nov. 1, 1893, until the time fixed for the termination of the contract.

In the court below a general demurrer to the plaintiff's petition was sustained. Plaintiff appealed.

Greer & Greer, and *O'Brien, Bordages & O'Brien*, for appellant.

Ford, Martin & Jones, for appellees.

FLY, J. The contract is undoubtedly one of partnership, and the question is presented, can a corporation created under the laws of Texas enter into a partnership with individuals?

. . . . . .

We conclude that the partnership formed between appellant and appellees was unauthorized by the statute, and contrary to public policy, and, while those parts of the contract which have been executed should be enforced between the parties, no enforcement of the unexecuted part of it can be properly demanded. *Parish* v. *Wheeler*, 22 N. Y. 494; *Thomas* v. *Railroad Co.*, above cited. The suit, in this case, does not relate to any matters that arose between the parties before the dissolution of the illegal partnership, but the cause of action is the probable profits that would have accrued to appellant had the

[1] Statement abridged. Arguments and part of opinion omitted. — ED.

partnership been continued. The suit is to recover damages for nonperformance of a contract unauthorized by law and obnoxious to public policy. The damages claimed arose from a failure to further prosecute an illegal enterprise. The law does not wield its power to prevent persons or corporations from withdrawing from illegal combinations, but rather encourages repentance and reform, even though at a late hour. When the illegal contract has ended by the acts of either party to it, future consequences resulting from the infraction will not subject the party to a suit for damages, but the parties will only be held responsible for those parts of the contract already executed. "The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case." *Swan* v. *Scott*, 11 Serg. & R. (Pa.) 155, cited by Thomp. Corp. § 6024. Applying this test to appellant's case, it must necessarily fall through, because it is based entirely upon the illegal contract of partnership.

The proposition is urged that, although the contract of partnership may have been invalid, still that part of it in regard to the delivery of the logs by appellant was legal, and should be enforced. The proposition cannot be entertained. The delivery of the logs grew out of it, and is inseparably bound to the invalid contract of partnership, and the whole contract was vitiated by the illegality of the partnership. Courts will not analyze a vicious and illegal contract, which as a whole is void, and enforce a part, which, independent of its vicious company and surroundings, would be legal and valid, but will decline to enforce any part of it. It would be unconscionable to validate the part of the contract relating to the logs, when there would have been no such contract without the partnership element entering into it. A different case might be presented if the suit were for logs furnished before the breach of the contract. The judgment is affirmed. Writ of error refused.

Affirmed.

MALLORY *v.* HANAUR OIL WORKS.

SUPREME COURT OF TENNESSEE, 1888.

[86 *Tenn.* 598.[1]]

LURTON, J. This is an action of unlawful detainer, brought by the Hanaur Oil Works, a corporation created under the General Incorporation Act of 1875, and engaged in the manufacture of cotton seed oil at Memphis, Tenn.

The facts which raise the question to be determined are these: In July, 1884, a contract was entered into by and between four corporations engaged in manufacturing cotton seed oil at Memphis for the formation of what is designated in the agreement as a "combination syndicate" and "partnership." The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents, and employes selected by them, for the common benefit, the profits and losses of such operations to be shared in proportions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years, and, as appears, was at end of first year renewed for two other years, terminating August 1st, 1887.

The argument here has largely turned upon the correctness of the charge of the Circuit Judge, who distinctly instructed the jury that the contract between the Hanaur company and the other four corporations was a contract for a partnership between corporations, and that under the charter of the Hanaur Oil Works it had no power to make such a contract, and that it was therefore void, and that it had a right to recover possession of its property, it being withheld solely under and by virtue of an agreement *ultra vires*.

The decided weight of authority is that a corporation has not the power to enter a partnership, either with other corporations or with individuals. Says Mr. Morawetz: "It seems clear that corporations are not impliedly authorized to enter into partnership with other corporations or individuals. The existence of a partnership not only would interfere with the management of the corporation by its regularly appointed officers, but would impair the authority of the shareholders themselves, and involve the company in new responsibilities through agents over whom it had no control." 1 Morawetz on Corporations, § 421; *Whittenton Mills* v. *Upton*, 10 Gray, 582 (S. C., 71 Am. Dec., 681); Angell & Ames on Corporations, § 272.

It is unnecessary to consider this contract as constituting a mere traffic arrangement; for the conclusion already announced that it was an effort to form a partnership, determines that in its scope and effect

[1] This case is abridged. — ED.

it sought to accomplish much more than would be understood by the phrase "traffic arrangement."

The result is, that we hold that there was no error in the charge of the Circuit Judge, or his refusal to charge, and the judgment must be affirmed, with costs.

EMERY ET AL. *v.* THE OHIO CANDLE CO.

SUPREME COURT OF OHIO, 1890.

[*Reported* 47 *Oh. St.* 320.]

IN 1880 an unincorporated company was formed, to continue six years, called The Candle Manufacturers' Association, which included the manufacturers of ninety-five per cent. of the star candles in that part of the United States lying east of the 114° of longitude west of Greenwich, or substantially all the territory east of the western boundary of Utah. Its object was to increase the price and decrease the manufacture of candles in the territory covered by the agreement; and is found, as a fact, to have had that effect during the whole existence of the association. The members composing the association were required to pay into its treasury two and one half cents per pound on every pound of candles disposed of on their own account within the territory. But neither was bound to operate his factory; and whether he did, or did not, he received at stated times his proportion of the profits of the pool, which was based upon the business that had been done by him in previous years; thus making it to the interest of each member to operate his factory when the price of candles was high, and to remain idle when the price was low.

The Ohio Candle Company, incorporated under the laws of this state, joined the association in 1883, and withdrew therefrom in March, 1884. During the month of January of that year it had paid into the association $22.40, but there was due to it, under the terms of the agreement, as profits for that month, the sum of $2,151.17. The committee agreed to pay the company the sum it had paid in, but refused to pay the sum due as profits, on the ground that by withdrawing before the expiration of the life of the association it had violated the agreement, and was entitled to none of its gains. Thereupon the company brought suit for the amount against the members comprising the committee, to which the bank was made a party, asking that the bank be ordered to pay the money to the plaintiff, or that a judgment be rendered in its favor for the amount with interest.

BY THE COURT. We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary to public policy, and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to

recover a sum due the plaintiff under the terms on which the association was formed. The committee represent the association, and a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defense on which they might have relied, had the objects of the association been perfectly legitimate. But should a court be called on to consider any defense, so long as the claim itself is based upon an agreement to which it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, nor under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the ill-gotten gains. The case of *Norton* v. *Blinn*, 39 Ohio St. 145, can have no application here, for this is a suit between *parties* to enforce the terms of the illegal agreement. See *Texas & P. Ry. Co.* v. *Southern Pac. Ry. Co.*, 6 Southern Reporter, 888, where *Brooks* v. *Martin*, 2 Wall. 70, is accurately distinguished, and shown to have no application to a case such as this.

Judgment reversed and petition of plaintiff below dismissed.

NESTER ET AL., APPELLANTS, *v.* CONTINENTAL BREWING CO. ET AL.

SUPREME COURT OF PENNSYLVANIA, 1894.

[*Reported* 161 *Pa. St.* 473.[1]]

BILL in equity for account.

The bill set forth: That during June, 1886, defendants all, with one exception, being brewers, in Philadelphia, formed an unincorporated association called "The Brewers' Association of Philadelphia," under articles of agreement in writing. That on July 22, 1886, the Enterprise Brewing Company, Limited, became a member of said association; that by statements of account rendered monthly to the company, it appeared that from July, 1886, to and including December, 1886, the sum of $14,435.77 was due from the association to the company.

OPINION BY MR. CHIEF JUSTICE STERRETT, May 14, 1894:

The conclusions of fact found by the learned court below were amply justified by the record. "It cannot be gainsaid that the object of this combination is to enable the forty-five brewers of Philadelphia, individuals, firms and corporations, who have entered into it, to regulate and control the sale and price of beer within the city of Philadelphia and the county of Camden, N. J. It certainly is a combination in

[1] This case is abridged. — ED.

restraint of trade, tending to destroy competition and create a monopoly in an article of daily consumption."

The test question, in every case like the present, is whether or not a contract in restraint of trade exists which is injurious to the public interests. If injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious.

So, it is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, nor the extent of space included, in the combination; but upon the existence of injury to the public. One combination, consisting of but part of those engaged in a given branch of trade, may amount to a practical monopoly; while another, less extensive in its scope, may as well bring disaster in its train.

So if the natural tendency of such contracts is to injuriously affect public interests, the form and declared purpose are immaterial. Courts will not lend their aid in illegal transactions no matter how disguised.

Decree for defendants affirmed and appeal dismissed with costs to be paid by appellants.

ADDYSTON PIPE AND STEEL COMPANY *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1900.

[*Reported* 175 *U. S.* 211.[1]]

MR. JUSTICE PECKHAM. This proceeding was commenced in behalf of the United States, under the so-called anti-trust act of Congress, of July 2, 1890, c. 647, 26 Stat. 209. It was undertaken for the purpose of obtaining an injunction perpetually enjoining the six corporations, who were made defendants, and who were engaged in the manufacture, sale and transportation of iron pipe at their respective places of business in the States of their residence, from further acting under or carrying on the combination alleged in the petition to have been entered into between them, and which was stated to be an illegal and unlawful one, under the act above mentioned, because it was in restraint of trade and commerce among the States, etc.

It was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves, by which they agreed that there should be no competition between them in any of the States or Territories mentioned in the agreement, (comprising some thirty-six in all,) in regard to the manufacture and sale of cast-iron pipe, and that in obedience to such agreement and combination, and to carry out the same, the defendants had since that time operated their shops and had been selling

[1] This case is abridged. — ED.

and shipping the pipe manufactured by them into other States and Territories, under contracts for the manufacture and sale of such pipe with citizens of such other States and Territories. There was to be a "bonus" charged against the manufacture of the pipe, to the extent set forth in the agreements and to be paid as therein stated. The whole agreement was charged to have been entered into in order to enhance the price for the iron pipe dealt in by the defendants.

In certain sections of the country the defendants would have, by reason of their situation, such an advantage over all other competitors that there would practically be no chance for any other than one of their number to obtain the contract, unless the price bid was so exorbitant as to give others not so favorably situated an opportunity to snatch it from their hands. Under these circumstances, the agreement or combination of the defendants, entered into for that purpose and to directly obtain that desired result, would inevitably and necessarily give to the defendant, who was agreed upon among themselves to make the lowest bid, the contract desired and at a higher price than otherwise would have been obtained, and all the other parties to the combination would, by virtue of its terms, be restricted from an attempt to obtain the contract.

The combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement.

We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question — whether the necessary effect of the combination is to restrain interstate commerce.

To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified, and limited

to that portion of the combination or agreement which is interstate in its character. As thus modified, the decree is

Affirmed.

POOLING AGREEMENT ILLEGAL. — Hopkins v. U. S., 171 U. S. 578; U. S. v. Joint Traffic Assn., 171 U. S. 605; Addyston Pipe Co. v. U. S., 175 U. S. 211; Connolly v. Sewer Pipe Co., 22 Sup. Ct. Rep. 431; Dolph v. Laundry Co., 28 Fed. 553; U. S. v. Tellico Coal Co., 46 Fed. 342; Lowry v. Tile Assn., 106 Fed. 38; Atlanta v. Pipe Co., 101 Fed. 900; Ins. Co. v. Cornell, 110 Fed. 816; State v. Ins. Co., 66 Ark. 466; Vulcan Co. v. Hercules Co., 96 Cal. 510; State v. Gas Co., 153 Ind. 483; Moore v. Bennet, 140 Ill. 69; Anderson v. Jelt, 89 Ky. 375; State v. Phipps, 50 Kans. 609; Woodenware Assn. v. Starkie, 84 Mich. 76; Wiltenberg v. Mollyneaux, 60 Neb. 583; Manchester Bk. v. Concord R. R., 66 N. H. 127; Staton v. Allen, 5 Denio, 434; Judd v. Harrington, 139 N. Y. 105; Cohen v. Envelope Co., 166 N. Y. 292; Guerinck v. Alcott, 63 N. E. 714; Morris Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Stall v. Schlitz Co., 104 Tenn. 715; Handle Co. v. Handle Co., 59 S. W. 709; Hornick v. Brewing Assn., 88 Tex. 184; State v. Compress Co., 67 S. W. 1049; Richards v. Desk Co., 87 Wis. 503. — ED.

AIKENS *v.* WISCONSIN.

SUPREME COURT OF UNITED STATES, 1904.

[25 *Sup. Ct. Rep.* 3.]

THE plaintiffs in error were severally charged with unlawfully combining together with the intent of wilfully and maliciously injuring The Journal Company, a corporation, and certain persons named, stockholders and officers of the company, in their trade and business. It was alleged that the company was publisher of a newspaper in Milwaukee, and had notified an increase of about 25 per cent in its charges for advertising, and that thereupon the plaintiffs in error, who were managers of other newspapers in the same place, in pursuance of their combination, and with the intent of wilfully, maliciously, and unlawfully injuring The Journal Company and the others named, agreed as follows: If any person should agree to pay the increased rate to The Journal Company, then he should not be permitted to advertise in any of the other three newspapers except at a corresponding increase of rate; but if he should refuse to pay the Journal Company the increased rate, then he should be allowed to advertise in any of the other three papers at the rate previously charged. It was alleged that this conspiracy was carried out, and that much damage to the business of The Journal Company ensued.

Mr. Justice HOLMES, after stating the facts:

If all these general considerations be admitted, it is urged, nevertheless, that the means intended to be used by this particular combination were simply the abstinence from making contracts; that a man's right so to abstain cannot be infringed on the ground of motives; and further, that it carries with it the right to communicate that intent to abstain to others, and to abstain in common with them. It is said that if the statute extends to such a case it must be unconstitutional. The fallacy of this argument lies in the assumption that the statute stands no better than if directed against the pure nonfeasance of singly omitting to contract. The statute is directed against a series of acts, and acts of several, — the acts of combining, with intent to do other acts. The very plot is an act in itself. But an act which, in itself, is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

UNITED STATES *v.* SWIFT ET AL.

CIRCUIT COURT OF UNITED STATES, 1904.

[122 *Fed. Rep.* 29.]

GROSSCUP, Circuit Judge, said (in part): The averments of the petition in this respect may be summarized as follows: That the defendants are engaged in an unlawful combination and conspiracy under the Sherman act in (a) directing and requiring their purchasing agents at the markets where the livestock was customarily purchased, to refrain from bidding against each other when making such purchases; (b) in bidding up through their agents, the prices of livestock for a few days at a time, to induce large shipments, and then ceasing from bids, to obtain livestock thus shipped at prices much less than it would bring in the regular way; (c) in agreeing at meetings between them upon prices to be adopted by all, and restriction upon the quantities of meat shipped; (d) in directing and requiring their agents throughout the United States to impose uniform charges for cartage for delivery, thereby increasing to dealers and consumers the charges for such meats.

No one can doubt that these averments state a case of combination. Whether the combination be unlawful or not, depends on whether it is in restraint of trade. The general meaning of that term is no longer open to inquiry. It is clear that restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred; nor is it to be tested by the prices that result from the combination. Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices, may, as against the producer, be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman act as now interpreted, restraint of trade.

Thus defined, there can be no doubt that the agreement of the defendants to refrain from bidding against each other in the purchase of cattle, is combination in restraint of trade; so also their agreement to bid up prices to stimulate shipments, intending to cease from bidding when the shipments have arrived. The same result follows when we turn to the combination of defendants to fix prices upon, and restrict the quantities of meat shipped to their agents or their customers. Such agreements can be nothing less than restriction upon competition, and, therefore, combination in restraint of trade; and thus viewed, the petition, as an entirety, makes out a case under the Sherman act.

Demurrer overruled.

SWIFT ET AL v. UNITED STATES.

SUPREME COURT, UNITED STATES, 1905.

[*Boston Herald, Jan.* 31, 1905.]

MR. JUSTICE HOLMES said in part: To sum the bill up shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid up prices for a few days, in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and, finally, to get less than lawful rates from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination, but as it is alleged that the defendants have each and all made arrangements with the railroads that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition, and in view of the general allegation to which we shall refer, we think that we have correctly stated the purport of the bill.

The scheme, as a whole, seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. (Aikens *v.* Wisconsin, 195 U. S. 194, 206.) The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt.

Affirmed.

Rea, Kitchel & Shaw, and *Scott, Longbrake & Van Cleve*, for appellants.

Thomas Canty and *Robert Christensen*, for respondent.

DICKINSON, J.[1] In the spring of 1884 the defendants entered into articles of association, intending to acquire a corporate character, and probably supposed that this purpose had been accomplished. No incorporation was, however, effected. The articles of association executed by the defendants declared the purpose of the proposed corporation to be to secure the extension of a certain street in Minneapolis, and to improve and beautify the same. They provided for no capital stock, but that the funds necessary for the accomplishment of the contemplated purpose should be raised by subscription from the members. The usual officers were named, and a board of five directors provided for; meetings of the members were held; officers and a board of directors elected; by-laws adopted, which provided for the appointment of an executive committee, whose duty was declared to be to direct and superintend the work and to employ the necessary labor; subscriptions were made by all of the defendants, excepting Stark, for the purposes of the association; a contract was made between the association, by its adopted name, and certain contractors, (Egan & Salter,) for grading and improving the street, and the performance of the work under the contract was entered upon. The plaintiff was an employé of Egan & Salter, and engaged, with others, in the work. During the progress of the work, the employés of the contractors, becoming dissatisfied with their employers, ceased to work. Then two of the defendants, Mathews and Riebeth, who were respectively vice-president and secretary of the association, made an agreement with the laborers, the precise nature of which is in dispute. The evidence on the part of the plaintiff is sufficient to support what must have been the conclusion of the jury, that the agreement was that if the men would go on with the work, the association would pay them; while the evidence for the defendants tended to show that the agreement was merely to pay directly to the laborers the money which should be due to Egan and Salter on their contract. By this action the plaintiff seeks to recover against the defendants individually upon this agreement.

The attempt to become incorporated was ineffectual to limit the individual liability of the associates; and upon any contract which they may be found to have authorized to be made, or which they may have ratified, although in terms the contract was made as the contract of the association or assumed corporation, the members may be held to an individual responsibility. *Hess* v. *Werts*, 4 Serg. & R. 356; *Pettis* v. *Atkins*, 60 Ill. 454; *Bigelow* v. *Gregory*, 73 Ill. 197; *Garnett* v. *Richardson*, 35 Ark. 144; *Kaiser* v. *Lawrence Sav. Bank*, 56 Iowa, 104; *Abbott* v. *Omaha Smelting Co.*, 4 Neb. 416; *Field* v. *Cooks*, 16 La. Ann. 153; *Jessup* v. *Carnegie*, 44 N. Y. Super. Ct. 260. While, if the other contracting party were to charge the defendants in their

[1] Mitchell, J., did not hear the argument and took no part in this case.

B. Trust Agreement.

VANDERBILT *v.* BENNETT.

County Court, Pennsylvania, 1889.

[*Reported* 6 *Pa. County Court Reports*, 193.]

Bill in equity. Exceptions to master's report, C. P. No. 1, Allegheny County.

The bill was filed by Cornelius Vanderbilt against Bennett *et als.*, to restrain defendant from exercising the voting power incident to 2000 shares of stock in the Pittsburgh & Lake Erie R. R. Co., owned by plaintiff; and to restrain them from interfering with plaintiff in the exercise of his rights of ownership thereof. Defendant filed an answer. The cause was referred to C. S. Fetterman, Esq., as master, whose findings of fact were, in part, as follows:

October 20, 1877, an agreement in writing was entered into by various stockholders of the railroad company, including William H. Vanderbilt, who then owned 2000 shares. By this agreement all the shares of the subscribers were to be registered in the names of trustees, and these trustees and their successors were to have perpetual power to vote upon the same; and were to vote with a view to carrying out certain objects and policies defined in the agreement. Certificates were to be issued, and were issued, to Vanderbilt and other subscribers giving them all the rights of stockholders except the right to vote upon the stock, and reciting that the perpetual power of voting is vested in the trustees.

Stowe, P. J. The questions involved in this controversy are of the gravest character, and should have had a more deliberate and careful consideration, both by the master and the court, than either have had time to bestow upon it. The former has had four or five days to prepare his report, and the latter one day to consider the exceptions. It is hoped that this will be sufficient apology for any shortcomings in the one and the want of an extended opinion by the other sustaining the views entertained by the court in this matter. We think that the trust agreement in question is absolutely void as contrary to public policy, and because it substantially amounts to a repeal of our Act of Assembly in regard to the right to vote incident to the ownership of railroad stock. But whether this be so or not, which, as the case stands, is not judicially before us for our determination, we are of the opinion that it is at least revocable by the plaintiff, and has been duly revoked so far as his stock is concerned, and, therefore, the exceptions to the master's report are now overruled, and decree in accordance herewith *pro ut.*

But we are also of opinion that under the circumstances of this case the plaintiff should pay the costs of this proceeding.

NOTE. An appeal to the Supreme Court from the decree entered in accordance with this opinion was *non prossed* at October Term, 1888, it being understood that the parties had agreed upon a settlement.

ROBINSON, J., IN SHEPAUG VOTING TRUST CASES.

1890. 60 *Conn.* (*Supplement*), 553, pp. 578-581.

. . . . . .

IT seems to the court that the surrender by a stockholder of his power and right to vote on his stock for the term of five years is contrary to the policy of the law of this state. Were this a power of attorney in formal terms, no claim would be made but that it was not only contrary to the policy of the law of this state, but in direct conflict with our statute, which says that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting; and no such power shall be used at more than one annual meeting of such corporation." Gen. Statutes, § 1927. This statute tends to disclose what the policy of the law of this state is, touching the matter of the surrender by a stockholder of his voting power to some one else. It would seem that it is opposed to such surrender for an indefinite period or for a period of five years. Evidently it was thought a longer surrender of the voting power would result disastrously in many ways.

It cannot be denied that as much disaster might follow to the business and the finances of a corporation and the interest of stockholders, where the voting power is yielded up in a five years voting trust, as by a five years power of attorney. The difference between an irrevocable power and a power irrevocable for five years, is a difference in degree and not in principle. A five year voting power, irrevocable for that time, would furnish time enough and opportunity enough to realize all the evils which our one year statute is manifestly intended to guard against.

It is the policy of our law that an untrammeled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to

dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.

And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow-stockholder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow-stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow-stockholders. For these reasons I hold that this trust agreement is void as against the policy of the law of this state.

And why is not the voting power surrendered in this trust agreement the equivalent of a power of attorney, and why has not the right of this Trust Company and this committee to control and cast the vote upon this stock, if at any time they had any legal right to exercise it, ceased to exist? It is now more than one year since the voting power was executed, and that power has been used already at one annual meeting. Why is not this voting power in this trust agreement, and the attempt of this trustee and this committee to exercise it now, a disobedience of our one year statute above quoted?

It is claimed that it is not a power of attorney because the Trust Company holds the legal title to the stock. It is said that the right to vote on the stock is not dissociated from the legal title to the stock in this instance. But does this reply quite answer the objections created by the facts in the case, and is it quite true that the voting power here is not dissociated from the legal title? An examination of the trust agreement discloses that the Trust Company is a mere agent, with no beneficial interest in the stock. It holds the title, but the real owner is somebody else. The Trust Company is simply the hand to cast such

ballot as this committee directs. The committee is also but an agent, but without the legal title to the stock or any title to it. It is the head, and the Trust Company is the hand; simply that. The committee direct, control, and select what vote shall be cast, and are the agents and attorneys to perform this very essential part of the act of voting.

The trust company is one of the parties to the trust agreement, and it holds the legal title to the stock, and as such holder of the legal title it has in this trust agreement surrendered all a voter's power except the mere manual act of casting the selected ballot. It has in this trust agreement in effect surrendered to this committee the power to select the ballot. It has conceded to this committee the power to demand that it shall vote as they direct. What remains then in this trustee of the voting power, beyond being the mere hand, the use of which this committee is given the right to demand for this purpose at any stockholders' meeting? Is not the full voting power to all intents and purposes in this committee, and is it not so by delegation? It seems to me that the voting power in this trust agreement falls within the spirit and intent of the prohibition of our statute heretofore referred to, and is terminated by lapse of time and the use of it already at one annual meeting.

It is insisted that there is nothing illegal, *per se*, in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations, and when this is all there is to the scheme; but when underlying that pooling contract there is between the members of the syndicate, who are directors or a majority of the directors of the corporation, a secret agreement which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves the profits arising from such extension, or from the contracts which they as directors make, elements of unfairness and opportunity for fraudulent and dishonest practices are introduced, which the court cannot too severely condemn. Such a pooling contract or voting trust is in violation of the most elementary principles of law governing the dealings of trustees with trust property and their *cestuis que trust.*

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MOBILE AND OHIO R. R. CO. *v.* NICHOLAS.

1893. 98 *Alabama*, 92.[1]

APPEAL from Mobile Chancery Court.

Bill in equity by stockholder in Mobile & Ohio R. R. Co. against the railroad company, the Farmers' Loan & Trust Co., *et al.*

In 1876, the railroad company was in the hands of a receiver; decrees of foreclosure had been rendered in suits on mortgages; and its total indebtedness largely exceeded the value of the entire railroad property. An arrangement was made between the creditors and the company whereby the creditors accepted debentures in lieu of their original evidences of debt; and the great majority of the stockholders, in effect, conferred upon a trustee irrevocable power to vote upon the shares so long as any of the debentures should be outstanding. The shareholders assigned their stock to the committee of reorganization; the committee gave the Farmers' Loan & Trust Company an irrevocable power of attorney to vote upon the stock so long as any of the debentures should be outstanding. The shareholders who had thus assigned their stock to the committee received in exchange new certificates entitling them to all the rights and privileges which pertain to the ownership of the said shares, saving and excepting that such ownership is subject to the power heretofore granted by the owners of said shares to the Farmers' Loan & Trust Company, in trust for the security of the debentures, to vote upon said shares.

Under the foregoing adjustment, all the creditors, except those secured by newly issued first mortgage bonds, accepted the debentures provided for, in lieu of their former evidence of debt; the foreclosure decrees were assigned to the Farmers' Trust Company; the receiver, under the orders of the court, turned the property over to the railroad company; and the corporation resumed its control and management of its property and business.

In 1892, the plaintiffs denied the authority of the Trust Company, under the power of attorney held by it to vote their stock, and claimed for themselves the right to vote their own stock. The right of plaintiffs to vote at the stockholders' meeting was denied. Thereupon plaintiffs filed the present bill; praying, among other things, that the Farmers' Loan & Trust Company be enjoined from voting on the stock under the power of attorney; and that the railroad company be enjoined from refusing to accept the votes of plaintiffs and of other stockholders.

A preliminary injunction was granted. The defendants moved to dismiss the bill for want of equity, and to dissolve the injunction. The Chancellor overruled the motions. From his decrees an appeal was taken.

[1] Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

E. J. Phelps, and *Fred. W. Whitridge*, for railroad company, appellants.

E. L. Russell, and *R. P. Deshon*, for appellants.

Hannis Taylor, for Farmers' Loan & Trust Co., appellants.

H. C. Tompkins, *Gaylord B. Clark*, *William J. Curtis*, and *Alfred Jaretzki*, for appellees.

COLEMAN, J. [After stating the case.] The facts stated in the bill show, that by the reorganization and compromise of 1876, perfected in 1879, the voting power was severed from the stockholder, and until the payment of the debentures, irrevocably vested in the Farmers' Trust Company and the debenture holders. It is contended for complainants that the agreement was, and "is void *per se*," because 1st: "It contravenes the language of the charter of the railroad company; and 2d, because it is against public policy."

The charter expressly provides, "Each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person, or by lawful proxy."

So far, then, as the right to vote by proxy is questioned, the charter expressly grants the power, and the legislature has thus declared that it is not unlawful, *per se*, to separate the voting power from the stockholder, so far as the appointment of a proxy may be considered a severance of the voting power. Where a proxy is duly constituted, and the power of the appointment is without limitation, a vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. We do not hold that a power of attorney, absolute in its terms, will authorize the agent or proxy, to effect contracts, or legalize acts, outside of the scope of his authority, or contrary to law or public policy, neither could the stockholder in person by his vote effectuate such a result. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground, that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end, attempted to be effected by the exercise of the voting power. The distinction should be kept in view. Take the case of the *Richmond & Danville Extension Company* v. *The Woodstock Iron Co.*, 129 U. S. 643, cited by complainant. The Woodstock Iron Co. agreed to pay thirty thousand dollars, if the Georgia Pacific Railroad was run through the town of Anniston, where the Woodstock Iron Co. owned a large plant, mines, and other property. The contract was held void as being against public policy. No question of the separation of the voting power from the shareholder, arose in the case. It was the character of the contract, the unlawful purpose in view, to build up the Woodstock Iron Co. at the expense of the stockholders of the railroad company that was condemned. The same principle applies to many other cases cited in which, it was held, "that contracts made to influence railroad companies in selecting their routes and erecting their

depots and stations by donations in land and money to some of its directors and stockholders were invalid," citing *Bestor* v. *Wathen*, 60 Ill. 131; *Linden* v. *Carpenter*, 62 Ill. 307.

Take the case of *Hafer* v. *N. Y., Lake Erie & Western R. R. Co.*, 14 Weekly Law Bulletin, p. 68. The case is thus stated: "A controlling interest in the stock of the Cincinnati, Hamilton, and Dayton Railroad Company was bought up in 1882, and placed in the name of H. I. Jewett, who was Vice-President of the New York, Lake Erie, and Western Railway Co., under the agreement that he should give irrevocable proxy to such persons as the Erie should appoint to vote on the stock; that his stock certificates should be left in the hands of trustees, and that they should issue to the respective owners of the stock trust, or pool certificates for amounts equal to their respective equitable interest. On all stock thus pooled, the Erie agreed to guarantee a certain dividend."

The court declared the contract void "both on the ground that the power is denied to one corporation thus to acquire control of another, and that the stockholder can not barter away the right to vote upon his stock." True the opinion declares as an independent proposition, "that the stockholder can not barter away the right to vote upon his stock," and yet it is shown, by the facts of the case and the opinion, that the purpose to be effected by the barter of the right to vote, to wit, the placing "of an Ohio corporation into the hands of a New York corporation," the enabling "one corporation to acquire control over another" was illegal. Speaking of the facts of the case the opinion proceeds as follows: "It is obvious that the rule as to executed contracts can not be applied to the plaintiff for any such reason as that last mentioned, *for he was not a party to the contract.* There are other cases wherein special circumstances made it imperative, as a matter of good faith, that the contract should not be interfered with, and others, when the protection of interest acquired by innocent parties caused the court to refrain." There is no rule of law which requires contracts to be upheld which are void as against public policy, in order to preserve "good faith" or "innocent parties." The rule of estoppel is often applied to prevent undue advantage by one person over another, but the rule does not extend to contracts which are void because contravening public policy. Considering the opinion as an entirety, we do not regard it as authority to the proposition, that an agreement which provides for a separation of the right to vote from the holder of the stock is "*per se*," at all times and under all circumstances contrary to public policy and void. We have examined case after case and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not sanction if the principal had voted and not a proxy; and in cases of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form irrevocable. The doctrine as to dry trust does not arise in this case.

Certainly the case of *Griffith* v. *Jewett*, 15 Weekly Law Bulletin, 419, or of *Moses* v. *Scott*, 84 Ala. 608, do not sustain complainants' contention in this respect. If there were no precedents, upon principle, we would hold that in determining the validity of an agreement, which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties, neither will it annul them except to preserve its own majesty, and to conserve the greater interest of the public. Let us examine the conditions of the parties, the purpose in view and effect of the agreement of 1876, consummated in 1879, the consideration and interest surrendered and rights acquired by the readjustment, and issue of the debentures, the position of the complainants thereto, and the results of holding that reorganization, *per se*, void.

The complainants belong to the class known as "Assenting Stockholders." They surrendered their stock to the committee of reorganization in order that the power of attorney, executed to the trust company by the committee of reorganization, might be executed, and that the debentures should be issued to the creditors of the railroad corporation. The certificates of stock held by them show, upon their face, that they are subject to the power of attorney and to the rights of the debenture-holders. At the time the plan of adjustment was agreed upon the railroad company was in the hands of a receiver. Decrees of foreclosure rendered against the company. The indebtedness far exceeded the value of the railroad company's property. The execution of the decrees of foreclosure, by a sale of the property, and the prosecutions of the admitted claims against the railroad company, would necessarily have transferred the property to other parties and wiped out every vestige of present available interest or right of the stockholder, or hope of future profit. The creditors held the vantage ground, and in law their rights and interest were paramount to the stockholders. The latter might accept propositions but were in no position to dictate terms. These were the circumstances under which the settlement and agreement was made. Stated in short, the compromise and settlement led to the issue of the debentures to the creditors in lieu of their original evidences of debt, and a mortgage upon certain property to secure them, a plan for a sinking fund for their benefit, and the right and privilege under an irrevocable power of attorney to vote the stock *until the debentures were paid.* The power of attorney was not in perpetuity, or absolute, but only until the debentures were paid, and a fair construction under the circumstances required that the voting power should be used fairly and honestly to this end, or as stated in the agreement itself, "for the uses and purposes declared in said memorandum, and until the same are fully accomplished." In consideration therefor the decrees of foreclosure, at first suspended, were transferred to the trust

company, creditors surrendered their claims and accepted in lieu thereof the debentures, the receiver under the orders of the court restored the property to the Mobile & Ohio Railroad Co., which resumed management and control of its property and affairs, and the stock preserved to the stockholder.

To this agreement over forty-five thousand out of a total of about fifty-three thousand of shares of stock assented, and among those which assented were complainants. The creditors had the right to accept debentures for their debts. The agreement continued in existence the corporation and preserved to the stockholders their stock. It did not violate the charter of the railroad corporation. The purpose was legal, the means used did not contravene any statute of the State or principle of public policy, and was within the scope of the power of the contracting parties. Good faith on the part of the assenting stockholders, whose interests were thus preserved, and to those who accepted the debentures in lieu of other evidences of debt and securities, and to those who have since purchased them upon the faith of the plan of compromise demand that the terms of the contract be fulfilled. Tested by any principle of law, legal or equitable, the agreement was not only valid but fair at least to the corporation company and stockholders.

[It was contended that the acceptance by the creditors, under an arrangement made in 1887–1888, of general mortgage bonds, extinguished the debentures issued under the previous settlement; and that thereby the stockholders became reinvested with the voting power which they had relinquished for the benefit of the debenture holders. The Court *held*, that the acceptance of the general mortgage bonds, under the conditions and terms then specified, did not effect an extinguishment of the debentures.

It was also contended, that the agreement by which the stockholder parted with his voting power created the relation of surety and creditor between the stockholder and the debenture holder; and "that the voting trust has been terminated by the extension and enlargement of the debt, and by the substantial modification of the terms upon which the voting franchise was to be exercised." The Court *held*, that the relation of surety and creditor did not exist.]

. . . . . .

A decree will be here rendered dissolving the injunction granted upon the original bill, and dismissing the original bill for want of equity.

[1] In *Durkee* v. *People, ex rel. Askren*, A. D. 1895, 155 Illinois, 355, a by-law of a railroad corporation purported to confer on bondholders the right to cast one vote on every one hundred dollars of bonds; and the stock certificates contained an express statement that the stock was subject to the bondholders' right to vote at all meetings of stockholders.

Section 25 of the general railroad incorporation statute is as follows:

"In all elections for directors and managers of such railway corporations, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner."

HARVEY *v.* LINVILLE IMPROVEMENT CO.

1896. 118 *North Carolina*, 693.[1]

ACTION for an injunction and other relief, heard before *Timberlake*, J.

Plaintiff has an option for the purchase of a sufficient number of shares of the capital stock of the company to give him a majority thereof; and intends to purchase the same provided he can get control of the company. He asks (*inter alia*) for an injunction restraining Divine, Lenoir and MacRae (who are joined as defendants) from voting certain shares of stock, alleged to have now been purchased, by plaintiff, from Hahn, Worth and Kelsey.

It appeared that before plaintiff purchased said stock, a pooling agreement had been entered into by a majority of the stockholders, including Hahn, Worth and Kelsey. The plaintiff sought to have this pooling agreement declared invalid.

The pooling agreement was as follows:

"Whereas, the Linville Improvement Company is indebted to various persons in large sums of money, and is now in the hands of a receiver, appointed by a decree of the superior court of the County of Mitchell in the State of North Carolina; and whereas the undersigned, who are stockholders, and some of whom are also creditors of the said Company, are desirous to extricate the Company from its present financial embarrassment, pay off its debts, and enable it to resume its operations, now therefore we, the undersigned, stockholders of the Linville Improvement Company, have agreed, and do hereby agree with each other as follows:

"That, for the purpose herein set forth, we will pool of the stock of the said Company owned by us respectively, and will transfer the same to John S. Divine, T. B. Lenoir and Hugh MacRae, to be held by them and their successors upon the trusts and for the purposes herein declared. The said trustees shall give proper receipts for the stock so transferred to them. The said trustees shall have power to vote the said stock so transferred to them in all meetings of the stockholders of said Company, to borrow money to pay off and discharge the present indebtedness of the Company and to pledge the stock so held by them, or any part of it, as collateral security for the money so borrowed.

"If any vacancy among the said trustees shall occur at any time,

Said section 25 was enacted in pursuance of section 3, article 11, of the constitution, which contains the same provision and prohibition concerning the election of directors by stockholders as section 25 of the statute.

It was *held*, that the attempt to confer voting power upon bondholders (putting them on an equality in that respect with stockholders) was in conflict with the constitution and statute; and that hence votes cast by bondholders could not be counted. — ED.

[1] Statement abridged. — ED.

the same shall be filled by the votes of the holders of the majority of the stock represented in the agreement. And the holders of the majority of such stock shall have the right, whenever they see proper to do so, to instruct the said trustees how to vote upon matters arising, or to arise, in any meeting of the stockholders of said Company. Any one or two of the said trustees may vote the entire stock so transferred to them in any meeting of the stockholders of said Company, being so duly authorized in writing by the other or others.

"Any one or more of the said trustees, or of their successors herein, may at any time be removed, and their places filled by a vote of the majority of the stock herein represented. All stockholders shall at once pay up all unpaid subscriptions owing to the Company on the stock held by them. A meeting of the stockholders executing this agreement may be called by the trustees at any time upon ..... days' notice, and shall be called by them upon like notice at any time, upon request of any three or more of the stockholders executing this agreement; and in all such meetings, a majority of the said stock being present in person or by proxy, shall be a quorum; and any action taken by them shall be binding on all.

"This agreement shall be void if not executed by holders of the majority of all the stock of said Company, but when so executed it shall be enforced and binding upon all who sign it for the period of five years from the date hereof, unless it be sooner determined and put an end to by a vote of the holders of two-thirds of the stock represented herein. Upon the determination of this agreement the trustees shall transfer to each of us the stock owned by us respectively. Dated the 23d day of April, 1894."

Timberlake, J., refused to grant an injunction. Plaintiff appealed.

Davidson & Jones, for appellant.

Junius Davis, for appellee.

CLARK, J. At common law stockholders could not vote by proxy. *Taylor* v. *Griswold*, 14 N. J. Law, 222, and other cases cited in Cook on Stocks, Sec. 610. This is now otherwise, but it is still held that each stockholder, whether by himself or by proxy, must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which any number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy. *Cone* v. *Russell*, 48 N. J. Eq., 209. Various devices have been resorted to for the purpose of so tying up the stock that no one of the parties to the "pool" or combination can break the agreement. "Irrevocable" proxies to vote the stock have been given to a designated party who acted as trustee or agent, but the courts held such proxies not irrevocable and that they might be revoked at any time. Cook, *supra*, Secs. 610, 622; *Woodruff* v. *Dubuque*, 30 Fed.

Rep., 91; *Vanderbilt* v. *Bennett*, 2 Railway & Corp. L. J., 409. Another plan was to place the stock of the various parties in the hands of trustees, with power to transfer the stock to themselves and to hold and vote the same, trustees' certificates being issued to the various parties, specifying the amount of stock so deposited by them and their interest in the pool, but the courts held that any holder of a trustee's certificate might at any time demand back his part of the stock. *Woodruff* v. *Dubuque, supra*, and other cases cited in Cook, *supra*, Sec. 622. Another device was that the parties contracted together not to sell their stock for a specified time or only to a purchaser acceptable to them all. It was held that notwithstanding such contract any one of the parties might sell his stock to any one he pleased and at any time. *Fisher* v. *Bush*, 35 Hun, 642; *Williams* v. *Montgomery*, 68 Hun, 416. Another plan was to restrict by a by-law the right to transfer stock, but this was held illegal. *Morgan* v. *Struthers*, 131 U. S., 246, and other cases cited in Cook, *supra*, Sec. 332. A provision that a purchaser of a certificate of stock who sold in violation of the agreement should be entitled to the dividends, but should receive no right to vote, was likewise held invalid. *Harper* v. *Raymond*, 3 Bosw., (N. Y.,) 29. Numerous decisions affirm the correctness of the above rulings, which are based upon the illegality, because against public policy, of permitting large blocks of stock to be irrevocably tied up for the purpose of being voted *in solido* for the interest of a clique or section of the stockholders, and not according to the judgment of each individual stockholder for the benefit of the entire corporation. There are some few decisions trenching more or less upon the principles above stated, but we deem them contrary to sound principle of public policy, and hence not authority. In short, all agreements and devices by which stockholders surrender their voting powers are invalid. 5 Thompson Corporations, Sec. 6604. The power to vote is inherently annexed to and inseparable from the real ownership of each share, and can only be delegated by proxy with power of revocation. The "pooling" arrangement, admitted to have been entered into by the majority of stockholders in the present case, is contrary to public policy and voidable (*Woodruff* v. *Dubuque, supra*), and the plaintiff assignee of certain of the trustees' certificates is entitled to have his name entered as the owner and holder of the shares of stock represented by said trustees' certificates, and to have said shares issued to him, should the facts be found in accordance with his allegation, and to have the defendant restrained, till the hearing, from voting or controlling in any way the stock purchased by the plaintiff or in anywise interfering with the plaintiff's right to vote, control or dispose of said stock.

Error.

AVERY, J., did not sit on the hearing of this case.

SMITH *v.* SAN FRANCISCO & N. P. R. CO.

1897. 115 *California*, 584.[1]

ACTION, under s. 315, Civil Code, for the purpose of having it declared that Sidney V. Smith was elected a director at the annual meeting of the stockholders of the defendant company, instead of P. N. Lilienthal, who was declared elected. If certain votes which were rejected had been received, Smith would have been chosen. One of the votes rejected was that of Smith himself upon stock standing in his name.[2] To justify the exclusion of Smith's vote, the defendants, in their answers, alleged the following facts: In February, 1893, the estate of James M. Donahue, deceased, was the owner of forty-two thousand shares or thereabouts of the capital stock of the defendant railway company, which the superior court of Marin county had ordered to be sold in the course of the administration of his estate. Prior to the sale an agreement was entered into between Smith, Foster, and Markham for the purchase of this stock as an entirety, upon the representations of Smith that upon acquiring the shares an agreement would be made by them whereby, in order to secure the control of the management and business policy of the railway company, and for its prudent and economical management in the interest of all of its stockholders, the said forty-two thousand shares should, for the term of five years thereafter, be voted as a unit in the election of directors of said railway company. In pursuance of this agreement Smith and Foster, on the 24th of February, made their joint bid for the shares, offering to purchase them as an entirety for the sum of eight hundred thousand dollars and upward, and by order of court their bid was accepted, and on March 23d the sale was completed and the price paid. After the making of the bid, and before the consummation of the purchase and completion of the sale, Smith prepared the agreement for the voting of the shares as a unit that had been contemplated by the parties to the purchase, and on the 22d of March the same was executed in triplicate between Smith, Markham, and Foster. By this instrument, after reciting therein that the parties thereto had purchased the forty-two thousand shares of stock, and had agreed to retain the power of voting the stock for five years, "so as to keep the control of the corporation from passing to persons other than themselves," it was "mutually agreed between said Foster, Markham, and Smith that they will, during said period, retain the power to vote said shares in one body, and that the vote which shall be cast by said shares, whether for directors or for any other purpose, shall be determined by ballot between them or their survivors." It was in the contemplation of the

[1] Statement rewritten. Arguments and part of opinion omitted. — ED.

[2] The votes of Gundecker and Wagner were also rejected; the ground being that they were not *bona fide* stockholders. The statement as to their right is here omitted. — ED.

parties to the agreement that they might sell or otherwise dispose of some of the shares, and, accordingly, they made provision in this instrument for retaining the right to vote the stock so sold by them, and annexed thereto the form of an agreement to be taken by them from their vendees. This form or draft recited the purchase of the forty-two thousand shares by Foster, Smith, and Markham, and that, "for the purpose of keeping control of said road in the interest of themselves and of all persons who shall buy any portion of the stock from them," they have agreed that for the period of five years "they shall vote the said stock in one block" at all elections for officers. The purchase of the stock by Foster, Smith, and Markham was completed and the price therefor paid on the 23d of March, and twelve thousand three hundred and thirty-six shares of the stock were transferred on the books to each of them — five thousand shares being left in the name of the Mercantile Trust Company, subject to some prior trust. Prior to the day for the election in 1896, a conference was called to be held between Foster, Smith, and Markham, upon proper notice therefor, to determine by ballot how the vote of the shares should be cast at the next annual meeting for directors, and, in accordance with said notice, said conference was held, at which Foster and Markham were present, and, upon a ballot had thereat, it was determined that said shares should be voted for Markham, Newhall, and Lilienthal as directors. It was shown at the trial that at the meeting of the stockholders, held on February 25th, Smith tendered a vote for the shares standing in his name, and, at the same time, Foster presented the vote of the same stock by himself and Markham in behalf of Smith. Mutual protests against the votes were made by different stockholders, and the vote cast by Foster and Markham was received and counted, and that cast by Smith was rejected. Smith also testified that, after receiving the notice for the conference to determine the ballot to be cast, he informed Foster and Markham that he did not recognize the validity or legality of the agreement, and that he withdrew from the same, and would not be bound by anything which they might do thereunder.

At the trial the defendants sought to introduce in evidence the agreement of March 22d, and offered to prove, in connection therewith, the matters set forth in their answer relative thereto; but upon the objection by the plaintiffs to this offer, "on the ground that said agreement was not a proxy, and did not provide that any of the parties thereto should vote the stock belonging to the other, and that it was revoked before the election and was invalid as against public policy," the evidence was excluded, the court saying: "I will assume, for the purpose of my ruling, that it was a valid agreement, but that it was not an agreement which gave authority to any other person to cast the vote of Mr. Smith."

The superior court found that the agreement by Smith with the other stockholders did not preclude him from the right to vote the

stock standing in his own name as he might choose, and that the vote by the other stockholders for his stock was unauthorized, and his own vote should have been received. Judgment was thereupon rendered that Lilienthal had not been chosen as a director, and was not entitled to exercise the office, and that at the said election Smith was chosen one of the directors, and was entitled to be so recognized. A motion for a new trial on behalf of the defendants was denied, and from both the judgment and the order denying the new trial appeals have been taken.

W. S. Goodfellow, Jesse W. Lilienthal, and *Garret W. McEnerney,* for appellants.

Page, McCutcheon & Eells, for respondents.

HARRISON, J. . . .

. . . for the purpose of this appeal it is to be assumed that the evidence offered by the defendants would sustain the allegations of their answer, and the sufficiency of these averments to authorize the exclusion of the vote by Smith is to be determined. . . . That the instrument of March 22d constitutes an agreement that the forty-two thousand shares are to be voted "in one body," and that the parties thereto agreed that "they" would vote the stock "in one block," is stated therein in express terms. By this instrument they also "mutually agreed" that "*the vote*" to be cast by said shares should be determined by ballot "between them" or their survivors. To "determine by ballot" is to ascertain the result of balloting upon a proposition by those entitled to cast the ballots; and the "vote" — that is, the voting paper or ticket to be cast for the officers, which the parties agreed should be thus determined — is to be the same for the entire forty-two thousand shares. That by virtue of this agreement an authority was given by each of the parties to the others to determine "the vote" to be cast by the forty-two thousand shares of stock is too clear for argument. When they mutually agreed that they would "determine" between them the vote which "shall be cast" for directors, they declared by necessary implication that such vote should be cast in accordance with the results of that ballot, and that if either of them should fail to cast the vote as should be determined by the ballot, the vote so determined might be cast by the others. If we should hold that this instrument is to be construed as not giving authority to the majority of the parties thereto to cast the vote of the entire forty-two thousand shares of stock, as might be determined upon such ballot, we should be compelled to hold that the instrument was prepared in disregard of the agreement between the parties, and of the purpose for which it was to be executed. If there is any ambiguity in the language used for the expression of that agreement, it is to be construed so as to carry the agreement into effect, rather than to defeat its operation. No particular form of words is requisite to constitute a proxy. (Morawetz on Corporations, sec. 486.) Like any other agency, the instrument by which it is created may be informal,

but if, in order to give effect to its language in view of the purpose for which it is executed, it is necessary to construe the instrument as creating an agency, such construction will be given.

The instrument executed between the parties must, therefore, be held to be a proxy, and to authorize the vote of the forty-two thousand shares of stock to be cast in accordance with the determination of the majority of the parties thereto, and, if it was made upon a consideration sufficient to bind the parties to its enforcement, it must be regarded as still operative. One of the inducements for the purchase of the stock, and under which the parties entered into the agreement, was that the shares should be voted in one body, and held for five years as a unit. It is immaterial that the voting agreement was not reduced to writing and executed until after the bid had been made for the stock. It was so executed before the parties thereto had completed the purchase and become the owners of the stock by paying the purchase price. Nor is the validity of the agreement or the effect of its terms different by reason of different certificates having been issued in the names of the several parties to the transaction, rather than in the name of one of them. The agreement between them was with reference to the forty-two thousand shares of stock, and that it should be voted as a unit, and the purpose of the agreement was the economical management of the road, and to prevent irresponsible persons from getting control. It was within the power of the parties to contract in reference to this property as fully as with regard to any other property. They were at liberty to make as a condition of their purchase that its management should be held by either of them, or by a majority of the three, and the terms of the agreement for such purchase could not be repudiated by either after the purchase had been made. It may be assumed that neither of the parties would have entered into the transaction, or agreed upon the purchase of the stock, except upon these conditions, and it must be held that each contributed his money to the purchase of the stock upon the promise made to him by the others. There was thus a sufficient consideration for the agreement granting the right to vote the stock. It was in the nature of a power coupled with an interest, and, being given for a valuable consideration, could not be revoked at the pleasure of either. (*Hey* v. *Dolphin*, 92 Hun, 230.)

Although the court in excluding this evidence, assumed that the instrument was valid, counsel for respondents have presented an argument in support of their further objection thereto, that the instrument is invalid by reason of being against public policy, and it therefore becomes necessary to consider this objection, inasmuch as the action of the court, rather than its reason for so acting, is to be reviewed; for, if the instrument is invalid, the refusal of the court to allow any effect to be gained from its exercise was proper.

"Public policy" is a term of vague and uncertain meaning, which it pertains to the law-making power to define, and courts are apt to

encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Sir George Jessel, as Master of the Rolls, said in *Besant* v. *Wood*, L. R. 12 Ch. Div. 605, that public policy is "to a great extent a matter of individual opinion, because what one man or one judge might think against public policy, another might think altogether excellent public policy"; and in another case (*Printing, etc., Co.* v. *Sampson*, L. R. 19 Eq. 465), the same jurist said: "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." It is not in violation of any rule or principle of law for stockholders, who own a majority of the stock in a corporation, to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and, for this purpose, to appoint one or more proxies who shall vote in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect, and they may do this either by themselves, or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. If they are in accord as to the ultimate purpose, it is but reasonable that the will of the majority should prevail as to the mode by which it may be accomplished. It would not be an illegal agreement if articles of partnership should provide that stock in a corporation owned by the partnership, though standing in the individual names of the partners, should be voted by one of its members, and it is no more against public policy for such an agreement to be entered into between stockholders whose interests in the stock are separate than where their interests are joint. Viewed from considerations of public policy merely, it is immaterial whether such an agreement is made by the members of an existing partnership, which owns the shares, or in pursuance of an agreement by two or more persons to form a partnership for their purchase, or to purchase them for their joint account, or as one of the terms of an agreement for their purchase, by persons who contemplate no relation to each other further than that of owning stock in the same corporation. Such agreement would, in any case, be outside of the corporation and disconnected with the interest of every other stockholder, and, in either case, the same rules would control. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or is of such a character that it will not be enforced, will depend upon the object with which it is made, or the acts that are

done under it, and will be governed by other rules of law. [Omitting quotations and references.]

In cases of "voting trusts," where the owners of stock transfer the shares to trustees, with authority to vote at elections according to the direction of a majority of those holding trust certificates, and the only consideration for such transfer and agreement is the mutual promises of the several stockholders, it has been held that any stockholder may revoke his agreement and withdraw his stock at will; and it is also held that stockholders, who become such after an agreement of this nature is entered into, are not bound by its terms, but will hold their shares freed from the limitations of the agreement. (*Fisher* v. *Bush*, 35 Hun, 641; *Woodruff* v. *Dubuque, etc., Co.*, 30 Fed. Rep. 91; *Brown* v. *Pacific Mail S. S. Co.*, 5 Blatchf. 525; *Griffith* v. *Jewett*, 15 Week. Law Bull. 419.) . . .

The agreement in question cannot be regarded as illegal by reason of being in restraint of trade. The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673 of the Civil Code makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy, and there is nothing inconsistent with public policy for two or more persons, who contemplate purchasing certain property, to agree with each other, as a condition of the purchase, that neither will dispose of his share within a limited period, or for less than a fixed sum, or except upon certain limitations. They have the same right to contract with reference to the terms under which they will hold or dispose of the property after it shall have been purchased, as they have to agree upon any other terms upon which the purchase shall be made, and they no more violate a rule of public policy in making such agreement a consideration of their purchase than would two or more partners who should purchase property for partnership purposes, and agree that it should not be disposed of unless their vendee would assent to certain conditions regarding its use. These terms enter into, and form a part of, the consideration for the agreement to purchase, and are as binding and enforceable as any other terms of the agreement. (*New England Trust Co.* v. *Abbott*, 162 Mass. 148; *Hodge* v. *Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 618; *Williams* v. *Montgomery*, 148 N. Y. 519; *Matthews* v. *Associated Press, etc.*, 136 N. Y. 333; 32 Am. St. Rep. 741.) The contract in *Fisher* v. *Bush*, 35 Hun, 641, was held to be invalid for want of any other consideration than the mutual promise of the parties; but it was said in that case: "If these parties and their associates were the promoters of this corporation, then, doubt-

less, they could have entered into a valid agreement regulating a sale of the same, and requiring the owners to hold them from market for a reasonable and definite period of time, and thus forbidding a sale by either of his interests to one against whom his associates might have a reasonable objection. (*Moffatt* v. *Farquhar*, 7 Ch. Div. 591; reported in 23 Moak Eng. Rep. 731.) A stipulation of that character would not be illegal as against public policy, as it would be simply a provision assented to by all that the newcomer into the business transaction should be with the approval of the other joint owners."

Neither is it illegal or against public policy to separate the voting power of the stock from its ownership. The statute authorizes the stockholder to vote by proxy; and it was held in *People's Bank* v. *Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, that a by-law restricting the selection of proxies to stockholders was invalid; that the statute places no limitation upon the right of selection, and that a stockholder may appoint as his proxy one who is an entire stranger to the corporation. The right to appear by proxy implies of itself that the voting power may be separated from the ownership of the stock, and, unless the authority of the proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being the agent of the stockholder, he is required to use this discretion in behalf of his principal; but he is at liberty to use his own discretion as to the means by which his principal's interest will be best subserved. The cases in which it has been said that the stockholder could not divest himself of the voting power of his stock, and that it should not be separated from the ownership of the stock, were cases which involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised. The proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid; but the authority to exercise a discretion differs from an authority to perform a particular act. Under an appointment without words of limitation the proxy may act against the interests of the stockholder, or even against the interests of the corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person, while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power, and the attempt to authorize the exercise of an unlawful power. The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the expiration of the term. (*Shepaug Voting Trust Cases*, 60 Conn. 553, sometimes

reported under the name of *Bostwick* v. *Chapman; White* v. *Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178.) We have been cited to no instance where the purpose of a proxy given upon a sufficient consideration was lawful, and the person by whom the proxy was created continued to be the owner of the stock, in which the agreement has been held invalid. The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree for the same consideration to cast the vote himself, and an agreement with others to appoint a proxy upon the same considerations would be equally invalid. In *Cone* v. *Russell*, 48 N. J. Eq. 208, an agreement by the purchaser of stock to give to other stockholders his irrevocable proxy for the purpose of securing and maintaining the control of the company was held invalid, for the reason that it was one of the terms of the agreement that the directors, to be elected under its provisions, should employ the one giving the proxy at a fixed salary during its existence. Such an agreement was held to operate as an inducement to elect directors who would not act disinterestedly for the benefit of all of the stockholders, but rather to promote the interest of the parties to the agreement alone, and was therefore void, as being against public policy.

The court, however, said: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders." It was upon this principle that the agreements in *Hafer* v. *New York etc. R. R. Co.*, 14 Week. Law Bull. 68, *Guernsey* v. *Cook*, 120 Mass. 501, and *Fennessy* v. *Ross*, 5 N. Y. Sup. Ct. App. Div. 342, were held invalid. The same principle was declared in *Gage* v. *Fisher*, 65 N. W. Rep. 809. In *Mobile etc. R. R. Co.* v. *Nicholas*, 98 Ala. 92, the court held that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its ownership, saying: "Where a proxy is duly constituted, and the power of the appointment is without limitation, the vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end attempted to be effected by the exercise of the voting power."

From the foregoing considerations it follows that the superior court erred in finding that Gundecker and Wagner were *bona fide* stockholders in the defendant railway company, and also in refusing to receive in evidence the instrument of March 22d, and the evidence offered by the defendants in connection therewith, for the purpose of sustaining the averments of their answer.

The judgment and order denying a new trial are reversed.

VAN FLEET, J., MCFARLAND, J., and HENSHAW, J., concurred.

BEATTY, C. J., dissenting. — I dissent from the judgment and from the conclusions of the court on both of the principal points decided.

The contract between Smith, Markham, and Foster was, in my opinion, void as against the policy of the law giving to the holders of a majority of the stock of a corporation the right of control. Its sole purpose and object was to give to a minority of the stockholders the power to control the affairs of the corporation against the will of the majority, and that object is secured by means of this judgment. There is not time at my command to go over the decisions, but I am satisfied that the weight of authority is against the validity of any contract by which the sole owner of stock parts irrevocably with the right to vote it, with the effect of putting a minority in control of the corporation.

[Remainder of opinion omitted.] *Rehearing denied.*

BRIGHTMAN *v.* BATES.

1900. 175 *Massachusetts*, 105.[1]

HOLMES, C. J. These are actions upon a covenant executed by the defendants. The covenant recites that 1,360 shares of the stock of the Union Street Railway Company in New Bedford have been or are about to be purchased by a syndicate, under an agreement of September 4, 1894, that the plaintiff has been largely instrumental in organizing the syndicate, and that "he considers that for his services therein in case the syndicate is formed, and the aforesaid shares purchased, he should receive for his compensation" a certain amount of stock. These recitals are followed by several covenants on the part of the defendants and one other to give the plaintiff, in stock of the company at $169 a share, a commission of $4 a share "upon the number of shares of said stock we sell to said syndicate, less the number of shares we have severally subscribed as members of said syndicate," and certain other deductions, in case the compensation was not got from the syndicate. The judge before whom the case was tried found for the plaintiff, and the case is here upon a report of requests for rulings which in various forms raise the question whether such a finding can be justified in law.

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The syndicate referred to was formed under another written agreement, whereby the subscribers recite their desire to become members of it to the end that control of the railway company and advantage to them may be gained, agree to take the shares set against their names at $169 a share, and further agree after the purchase to enter

[1] Statement omitted; also part of opinion. — ED

into a pooling contract whereby all the syndicate stock "shall be voted at each annual meeting for a period of not less than three years, for such board of directors as shall be named" by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee. It is said that this agreement was illegal, and that the covenant sued upon was so directly aimed at helping to bring the unlawful arrangement about that it must fall with the other. *Barnes* v. *Smith*, 159 Mass. 344, 347; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396.

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Without deciding whether, if the covenant was dependent upon the rendering of further services, it was so closely connected with the syndicate agreement as to fall if the latter cannot be sustained, we pass to the question whether the latter agreement is unlawful on its face, bearing in mind that unless it is unlawful on its face it has the advantage of a finding in favor of the plaintiff. In dealing with this question it does not need to be said that combination of common interests is necessary, and constantly is taking place. It is as legitimate for a majority of stockholders to combine as for other people. The fact that they expect "gain and advantage" — in the words of the syndicate agreement — to accrue to them, does not make the combination unlawful. That expectation and intent would have that effect only if the gain was to be at the expense of the corporation, or in some way was intended to work a wrong to the other stockholders. No such intent appears, and although it is impossible not to view such an arrangement with suspicion, it is also impossible to let suspicion take the place of proof.

The only serious ground of objection is the agreement that the stock "shall be voted at each annual meeting" for three years, for a board of directors named by the committee. It is suggested that this was an unlawful attempt by the contracting parties to deprive themselves in advance of their deliberative power and duty as stockholders, and to submit themselves to the dictation of five men who in the future might not be even members of the corporation. Perhaps the notion upon which these suggestions are founded has been pressed somewhat further than would be warranted by more far-seeing views, but we have no occasion to discuss it in this broad form. The question before us is not whether it would be possible to carry out the contract in a way which would have made the contract bad if specified in it, but whether it was impossible to carry out the contract in a way which might lawfully have been specified in advance. We put the question in this form because there is no doubt that the subscribers might actually have done the things stipulated without giving any one a right to complain. That is to say, they might have held their stock and voted by previous understanding according to the advice of the committee, as long as they chose. The question is what they might contract to do; for this is supposed to be a case where a contract to do lawful acts is unlawful.

The syndicate agreement does not specify how it is to be carried out. It contemplates the making of another contract. As the later contract is to be a pooling contract, it was possible, if not probable, that one element of the arrangement would be that the title to the stock should be given to a trustee, and this happened in fact. During the three years the stock seems to have been held by a bank. The stock was transferred to it, and was not transferred to the members of the syndicate. But it would have been possible, consistently with the terms of the syndicate agreement, that the committee who were to name the board of directors themselves should be the trustees. In that case the trustees, of course, would have voted on the stock. They, not their *cestuis que trust*, would have been the stockholders for the time being. We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it. *Brown* v. *Pacific Mail Steamship Co.*, 5 Blatchf. 525, 527. See *Greene* v. *Nash*, 85 Maine, 148.

Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term certainly is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at will, and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. See *Williams* v. *Montgomery*, 148 N. Y. 519, 525. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other States show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together. *Faulds* v. *Yates*, 57 Ill. 416; *Smith* v. *San Francisco & North Pacific Railway*, 115 Cal. 584; *Havemeyer* v. *Havemeyer*, 11 Jones and Spen. 506, 512, 513. Affirmed, according to Beach, Corporations, § 304, n. 6, and *Fisher* v. *Bush*, 35 Hun, 641, in 86 N. Y. 618. See *Brown* v. *Pacific Mail Steamship Co.*, 5 Blatchf. 525, 527.

We have considered such decisions elsewhere as have been called to our attention or found by us. Few of them are by courts of final resort. Nothing that we have found in them satisfies us that the judge below was not warranted in finding for the plaintiff.

Judgment for the plaintiff.

GOULD *v.* HEAD *et al.*

CIRCUIT COURT OF THE UNITED STATES, 1889.

[*Reported* 38 *Fed.* 886.]

IN equity. Bill for injunction.

The American Cattle Trust was a voluntary association organized in New York with the general object to control corporations engaged in the live stock business. The method adopted by the parties thereto was the acquisition by exchange and the holding by a central body of trustees of the shares of any companies engaged in that business. This controversy related to the capital stock of the Phœnix Farm & Ranch Company, which had been conveyed.

HALLETT, J. The corporations thus associated renounced autonomy, but not their existence. They committed their affairs into the hands of the trust, because they could be better managed by the trust than by themselves. They still lived and owned their property, but the trust was a regency of their own creation, with absolute and irrevocable power over all their concerns. Ten corporations are mentioned in the affidavits as thus united in the trust, not by the direct act of the corporations but by transfer of their stock to the trust or to persons holding in its interest. And it is urged that by some general expressions in the articles of association the trust was given absolute authority to sell and dispose of the stock in its discretion. But this interpretation is not in accord with the purpose for which the trust was organized. The stock was transferred to the trust, not for the purpose of being sold but to give control of the corporation; to make the officers puppets in the hands of the trust, and thus substitute the latter as the governing body of the corporation. As before stated, it was organized for controlling corporations, and not for holding or acquiring property in its own right. The certificates of the trust issued in exchange for the stock of the Phœnix Farm & Ranch Company were on their face "shares in the equity to the property held by the trustees of the American Cattle Trust," and did not convey any property whatever. The stock thus obtained was given to complainant in exchange for other certificates of the trust, which he says he had previously purchased for a valuable consideration. To allow the trust to acquire stock from some of its members and transfer it to others by issuing and canceling certificates in this manner would be nothing less than common jugglery. Upon all that appears in the record, it must be said that the trust was without authority to alienate any of the stock of the several corporations in its control, and therefore complainant's title to the stock of the Phœnix Farm & Ranch Company is not good. The motion for injunction will be denied.

PEOPLE *v.* NORTH RIVER SUGAR REFINING CO.

1890. 121 *New York*, 582.[1]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court, and affirmed an order denying a motion for a new trial.

This action was brought by the attorney-general to have the defendant "dissolved, its charter vacated and its corporate existence annulled."

The complaint alleged, and it was found, that defendant is a corporation organized under the General Manufacturing Act; that it, together with other corporations engaged in the business of sugar refining, in violation of law and in abuse of its powers, became a party to and carried out a certain agreement. Some of the material features of this agreement are, in substance, as follows:

All the shares of the capital stock of all the corporations shall be transferred to a board consisting of eleven persons.

In lieu of the capital stock of each corporation, certificates not exceeding $50,000,000 shall be issued by the board, and allotted in certain proportions to the respective corporations. 15 per cent of the certificates thus allotted to each corporation shall be left with the board; the remaining 85 per cent shall be divided among the former stockholders in proportion to the amount of stock formerly owned by each.

The board of eleven persons, holding all the stock of all the corporations, may transfer shares to persons whom it may desire should be constituted directors of such corporations.

The several corporations shall maintain their separate organizations, and each shall carry on and conduct its own business.

The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends, shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock.

No action shall be taken by the board which shall create liability by it or by its members.

The certificates retained by the board (15 per cent of the entire issue) shall be subject to be disposed of by the board either for the acquisition of other refineries to become parties to this agreement, payment for additional capacity, or by appropriations to the several refineries.

The funds necessary to enable the board to make the payments herein provided to be made by it may be raised by mortgage to be made by

[1] Statement abridged. Arguments and portions of opinion omitted. — ED.

the corporations, or either, any, or all of them, on their property, and by such other means as shall be satisfactory to such board.

Vacancies in the board by expiration of office shall be filled at an annual meeting of the holders of certificates, at which said holders shall vote according to the number of shares for which they hold certificates.

Other facts material to the decision are stated in the opinion.

James C. Carter, and *John E. Parsons*, for appellant.

Charles F. Tabor, Attorney General, and *Roger A. Pryor*, for respondent.

FINCH, J. The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelops great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the State summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

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Two questions, therefore, open before us: first, has the defendant corporation exceeded or abused its powers, and, second, does that excess or abuse threaten or harm the public welfare.

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for as an unquestionable truth we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "Board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much, has lessened the supply upon the

market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such control can be secured by the voting power, in that board."

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

On the other hand it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other, vesting the partnership power in a board of control.

I have brought these two theories face to face where they may confront each other, because, when a choice is made between them, we have gone a long distance towards the end of the controversy.

[The learned Judge *held*, that the transaction was not a sale, but a trust constituted by mutual agreement.]

The combination, therefore, framed by the deed was a trust, and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

[The learned Judge here recapitulated the facts; which were, in substance, that the stockholders unanimously directed the secretary to sign the agreement in behalf of the corporation; that he accordingly did so sign; that a subsequent vote to revoke this action was ineffective; that, at a later date, the stockholders voted to sell all the stock to John E. Searles, Jr., for $325,000; that the stock was so conveyed to Searles; and that Searles thereafter conveyed all the stock to the board of eleven persons receiving therefor certificates for $700,000, deducting the 15 per cent retained by the board. The opinion then proceeds:]

What Searles did with the certificates, we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board; that Searles became President of the corporation; that its share of the regular dividend has been allotted to it for its certificate holders, and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There *was* corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such; a proposition which, if sound, dominates the whole field

of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the State's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the State can put its finger and say, this the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the State may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That again is corporate conduct, though there be an utter absence of directors' resolutions. Is it asked what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed? The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock-books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial, but the legal owners of the stock; and, if the board trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when, beyond that corporate neglect, they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in wilful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees

and directors general authority to manage the stock, property, and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that, would disarm the State in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hand, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in

People ex rel. v. *K. & M. T. R. Co.* (23 Wend. 193), "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it, was illegal and tended to the public injury, and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "over production." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust which is in substance and effect, a partnership of twenty separate corporations. The State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people, over-balancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. (*N. Y. & S. C. Co.* v. *F. Bank*, 7 Wend. 412; *Clearwater* v. *Meredith*, 1 Wall. 29; *Whittenton Mills* v. *Upton*, 10 Gray, 596.) The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied.

Indeed, in one of the papers added to the appellant's brief, it is not only admitted but asserted and defended. That paper shows quite clearly, that by force of the arrangement, there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however it may be described, amounts only to a practical consolidation which public policy does not forbid because the statute permits it. (Laws of 1867, chap. 960; Laws of 1884, chap. 367.) The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination.

And here I think we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and

protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the State by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly, or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

OLMSTEAD *v.* DISTILLING AND CATTLE FEEDING COMPANY.

CIRCUIT COURT OF THE UNITED STATES, 1895.

[*Reported* 73 *Fed.* 44.[1]]

THE defendant corporation had entered into the "Whiskey Trust." Because of this action a *quo warranto* proceeding had been commenced against it in the courts of Illinois and a judgment of ouster of all the franchises had been rendered. Thereupon receivers of its property had been appointed by the federal courts. In the present proceedings certain stockholders now petition the court to sell the distilleries, offering to buy the property for the sum of $9,800,000, to be paid in part by their claim against the assets.

SHOWALTER, Circuit Judge. The objection that the property ought not to be sold to these petitioners proceeds, apparently, upon the ground that the corporation attempted to create a trust or monopoly in that kind of property, and that these petitioners, representing upwards of 347,000 of the shares of the stock of defendant, were responsible for the unlawful conduct of the corporation, — upon the surmise that these petitioners are themselves, now and by this proposed purchase, attempting to monopolize the distillery business. It seems to me that there is no validity in this objection. In making their offer for this property, these petitioners are simply shareholders. In that capacity they are interested in the property in question, and have the right to preserve the same by buying it from the receiver, if the latter can be induced and empowered to sell. The court cannot assume that any improper use will be made of this property by the purchasers, nor can the court undertake to control the use of the property after it has been sold and conveyed by the receiver.

I think the order for sale may be made.

[1] This case is abridged. — ED.

TRUST AGREEMENT ILLEGAL. — Ontario Salt Co. *v.* Merchants' Co., 18 Ga. Ch. 540; Preservers Trust *v.* Mfg. Co., 46 Fed. 152; U. S. *v.* Patterson, 55 Fed. 605; State *v.* Central R. R., 109 Ga. 716; Distilling Co. *v.* P., 156 Ill. 486; State *v.* Cotton Oil Trust, 40 La. Ann. 8; State *v.* Fireman's Fund, 152 Mo. 1; Fire Ins. Co. *v.* State, 75 Miss. 24; State *v.* Distilling Co., 29 Neb. 700; Cameron *v.* Havermeyer, 25 Abb. N. C. 438; P. *v.* No. River Co., 121 N. Y. 582; Rice *v.* Rockefeller, 134 N. Y. 174; Wickler *v.* Colgate, 148 N. Y. 529; White *v.* Fire Co., 52 N. J. Eq. 178; State *v.* Standard Oil Co., 49 Oh. St. 137; State *v.* Buckeye Co., 61 Oh. St. 520; Mallory *v.* Oil Works, 86 Tenn. 598. — ED.

STATE *ex rel. v.* STANDARD OIL COMPANY.

SUPREME COURT, OHIO, 1892.

[*Reported* 49 *Oh. St.* 137.[1]]

THE state, by its Attorney-General, commenced this action to oust the defendant of the right to be a corporation on the ground that it has abused its corporate franchises by becoming party to an agreement that is against public policy. The agreement shown in the case provided that almost all the stockholders in the defendant company had transferred their stocks to certain trustees as had some forty other corporations engaged in the same business in pursuance of the same scheme. All of the stockholders of all of the companies involved received in return for their shares trust certificates issued by the trustees, equal at par to the par of the shares. The trustees thereupon elected themselves to be a majority of the directors of each of the constituent companies, and thereby controlled the conduct of each and so of all.

MINSHALL, J. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformable to the purpose for which it was created by the laws of its state. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products, throughout the entire country, and by which it might not merely control the production, but the price at its pleasure. All such associations are contrary to the policy of our state and void. *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Emery* v. *Ohio Candle Co.*, 47 *id.* 320. "The word 'trust,'" says Mr. COOK, "was first used to mean an agreement, between many stockholders in many corporations to place all their stock in the hands of trustees and to receive therefor trust certificates from the trustees. The stockholders thereby consolidated their interests and became trust certificate holders. The trustees own the stock, vote it, elect the officers of the various corporations, control the business, receive all the dividends on the stock and use all these dividends to pay dividends on the trust certificates. The trustees are periodically elected by the trust certificate holders. The purpose of the 'trust' is to control prices, prevent competition and cheapen the cost of production. The Standard Oil Trust, the American Cotton Seed Oil Trust and the Sugar Trust are examples of this method of combination."

[1] This case is abridged. — ED.

Cook on Stock and Stockholders, § 503a. See also, Wait on Insolvent Corporations, § 478.

Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer, is the usual pretext on which monopolies of this kind are defended; and it is well answered in *Richardson* v. *Buhl*, 77 Mich. 632. After commenting on the tendency of the combination, known as the Diamond Match Company, to prevent fair competition and to control prices, CHAMPLIN, J., said, "It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree."

A society in which a few men are the employers and the great body are merely employes or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited, the monopoly had been created by letters patent. But the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same whether created by patent, or by an extensive combination among those engaged in similar industries, controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust.

Judgment ousting the defendant from the right to make the agreement set forth in the petition and of the power to perform the same.

SECTION II. — WITH CENTRAL INCORPORATION.

A. Holding Corporation.

PAULY v. CORONADO BEACH CO.

Circuit Court of the United States, 1893.

[*Reported* 56 *Fed.* 428.]

Ross, District Judge. This suit was brought to recover of the defendant, as the holder and owner of certain shares of stock in a corporation called the Coronado Fruit-Package Company, its alleged pro rata share of certain indebtedness due from that company to the bank, of which the plaintiff is the receiver. The defendant and the Coronado Fruit-Package Company are both corporations duly organized under the laws of the State of California.

E. S. Babcock, Jr., was one of the incorporators of the defendant Coronado Beach Company, and the evidence in this case shows that he was the practical manager and controller of the business of that company. Acting for the Coronado Beach Company, he became one of the incorporators of the Coronado Fruit-Package Company, signing the articles of incorporation of that company, "E. S. Babcock, Jr., Trustee for Coronado Beach Company," and in the same capacity, and in the same way, he subscribed for 100 shares of the stock of the Coronado Fruit-Package Company, the certificate therefor being issued to "Coronado Beach Co., E. S. Babcock, Jr., Trustee." Eighty per cent. of the face value of the stock, to wit, the sum of $8,000, was paid by the Coronado Beach Company to the Coronado Fruit-Package Company, and the certificate of stock kept among the assets of the defendant company. All of this was done by the direction of E. S. Babcock, Jr.

Assuming that the acts of Babcock in these particulars should be considered and treated as the acts of the Coronado Beach Company, they must be held ultra vires of that company.

If it be assumed that the laws of California, conferring the right of forming corporations, is not limited to individual persons, it is nevertheless clear that the purposes of the defendant company, as expressed in its articles of incorporation, do not, expressly or by implication, include the subscription for shares in any other corporation, and the assumption of the resulting liabilities. See Mor. Priv. Corp. § 433.

There must be judgment for the defendant, and it is so ordered.

PAGE WOOD, V. C., IN JOINT STOCK DISCOUNT CO. *v.* BROWN.

1866. *Law Reports*, 3 *Equity Cases*, 139, pp. 150, 151.[1]

PAGE WOOD, V. C.

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Then as regards the second branch of the argument, which is this: that assuming this not to be within the clause for making advances and investing in securities, the directors are to do "all such things as they shall consider incidental or conducive to the attainment of the above objects" — it appears to me to be much too wide a construction of that clause to say, that if the transaction in question is not within the scope of the original terms there stated, it can be brought within the scope of doing that which is considered to be incidental to the attainment of the objects, the objects being to use money, by making it available in the shape of a return of interest, or of discount. How do they justify it in this resolution? They say, if we take all these shares in the bank, it will increase our connections. What a prodigious extension I must give to those words in order to bring it within the power of the directors to do anything which they may consider conducive to the interests of the company by increasing its connections, however unconnected with the objects stated! I apprehend those powers must be exercised only for the purpose of doing something *bonâ fide* connected with the objects to be attained, and in the ordinary course of business adapted to their attainment. This was the only ground on which I proceeded in the case of *Taunton* v. *Royal Insurance Company*, 2 H. & M. 135. There I found that the transaction impeached was in the ordinary course of business, and in the way in which other people conducted their business. In that case, if a large amount of advertisement, or of expenditure of money, had been found necessary, it would have been laid out properly; but to carry the principle on to any remote extension of the objects, on the ground that if shares were bought in this bank there would be some control over the business of the discounting, would be, I apprehend, wholly unwarranted by the plainest rules of construction, which must limit the company's powers to those transactions which are naturally conducive to the objects specified. If the principle were thus extended, it would apply to the buying shares in every sort of

[1] The memorandum, relative to the incorporation of the Joint Stock Discount Company, states certain specific objects for which the company is established, including the discounting of bills and notes; and then adds: "and the doing of all such things as the directors shall consider incidental or conducive to the attainment of the above objects." The directors invested funds of the said company in the shares of a new banking company. The Vice-Chancellor *held*, that such an investment did not come within the objects specifically stated in the memorandum. He then discussed the question whether the investment could be upheld under the general clause above quoted. — ED.

undertaking — a brewery, for instance, or any other business where discounts might be of use. The company might become shipbuilders, or might be engaged in any other business; they might buy a share in any general merchant's business, because there would be bills in that business which would want discounting, and so they might get more business.

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In this case the proceeding is simply an embarking in a totally different business; it is not the buying shares for the purpose of selling them again, or for investment, or anything of that kind, but it is buying shares for the purpose of enlarging the particular business which the company have to conduct. I think that it is clear that the bill must be answered, and the demurrer must be overruled, with costs.

PAGE, J., IN DAVIS *v.* U. S. ELECTRIC, &C., CO.

1893. 77 *Maryland*, 35, pp. 39, 40.

PAGE, J. . . . There is no question raised as to the power of the Brush Company to purchase and hold the stock of the United States Company. Since the case of *Booth et al.* v. *Robinson et al.*, 55 Md. 433, it is settled in this State, that "one corporation may deal in the shares of another, without express authority so to do, unless where expressly prohibited, or the nature of its business renders it improper so to deal." But it was contended at the argument, that the Brush Company, occupying the relation which it does to the public, had no right to participate at all in the election of directors. But we think this contention cannot be maintained. If it be conceded that the company can lawfully purchase and hold the stock, then, in the absence of any restriction contained in the charter, it must follow, as an incident to the ownership of the stock, as well as by the express terms of the statute, that it shall have a vote at all meetings of stockholders for each share of stock it may hold. *Mottu et al.* v. *Primrose*, 23 Md. 501.

In that case the court not only lays down this rule, but proceeds: "While the minority of the stockholders are entitled to protection against the fraudulent or illegal action of the majority, that protection is not to be had by denying to the majority their right annually to elect the Board of Managers."

The gravamen of the complaint made by the bill is, that the Brush Company, having obtained control of the management of the United States Company, is using its power to make that company subservient to its own interest, to use it as a feeder, and finally utterly to destroy it, whenever it shall be to their profit so to do. This, as was said in *Booth* v. *Robinson* (*supra*), would be a fraud of the most flagrant char-

acter. It would subject the corporation at whose instance the scheme was devised and executed, not only to a civil liability for the injury done, but also to the penalties of misuser or abuser of its franchises; and in such a case "courts can neither be too emphatic in condemning the act, nor too ready to afford the strongest remedy allowed by law for the prevention or redress of the wrong." In this case, the relief prayed for must be granted, if at all, in the exercise of the ordinary powers of a court of equity.

BLANCHARD, J., IN STATE *ex rel.* JACKSON *v.* NEWMAN.

1899. 51 *Louisiana Annual*, 833, pp. 837-839.

BLANCHARD, J. . . . Conceding that under some circumstances one corporation may not unlawfully acquire holdings of stock in another corporation, such holdings, we think, do not partake of the fulness of perfect ownership as defined by the Civil Code (Art. 491) giving "the right to use, to enjoy, and to dispose of . . . in the most unlimited manner."

They rather come under the head of what the Code (Art. 492) describes as "imperfect ownership," which only gives the right of enjoying and disposing of property when it can be done without injuring the rights of others.

For instance, when under circumstances tolerating it, a corporation, not possessing the express or necessarily implied power to do so, acquires stock in another corporation, it may collect dividends on the same and may at will dispose of it, and yet not have the power to vote the stock at elections for officials to govern and manage the affairs of the other corporation.

This is sustained by both reason and authority and founded in the public policy of the State.

If a corporation, like the N. O. Gas Light Co., formed to manufacture and sell gas *within certain limits* of the city of New Orleans, is permitted to acquire a controlling interest in the stock of another gas company authorized to make and sell gas *in another part* of the city, and by such controlling interest to practically take possession and manage the affairs of such other corporation, it, in effect, is equivalent to engaging in a business other than that authorized in its charter, and this is in direct violation of the fundamental law. Constitution 1879, Art. 237; Constitution 1898, Art. 265.

The public policy of a State is manifested by its fundamental law, or by legislation enacted in pursuance thereof, and that it is the duty of the judiciary to refuse to sustain that which is against public policy is beyond cavil.

In *Milbank* v. *N. Y. Lake Erie & Western R. R. Co.*, 64 Howard

Practice Reports, 20, it was held by the Supreme Court of New York that though a railroad corporation may take title to all kinds of personal property, including stock of other railroad corporations, to secure debts due it, the investment by a railroad company of its corporate funds in the purchase of the stock of another corporation is not necessary in the exercise of any of its corporate powers, is unauthorized, in violation of the statute, and, consequently, *ultra vires*. Further, that while a railroad corporation remains the owner of the stock of another corporation it may collect and receive dividends thereon, and has the right to sell and dispose of the same, it has *no right* to vote *thereon*.

To the same effect is the ruling of the Supreme Court of Alabama in *Memphis & Charleston R. R. Co.* v. *Woods*, 88 Ala. 631.

See, also, *Central R. R. Co.* v. *Collins*, 40 Ga. 582; *Hazelhurst* v. *Savannah G. & N. R. R. Co.*, 43 Ga. 13; and 130 Ill. 268.

The conclusion reached is that the N. O. Gas Light Co. could not legally vote the shares of stock in the Jefferson City Gas Light Co., owned and held by it, either in its own name or in the names of other persons, at the election held for directors on the 7th day of November last, and not having such legal right it is without just cause of complaint that its vote was not received and counted.

CALIFORNIA NATIONAL BANK *v.* KENNEDY.

1897. 167 *United States*, 362.[1]

ERROR to the Supreme Court of California.

Kennedy, the original plaintiff, is a creditor of the California Savings Bank, which is now insolvent. He seeks to recover against the California National Bank, upon the ground that it was a stockholder in the Savings Bank and consequently liable under the statute of California to pay the debts of the Savings Bank in proportion to the amount of stock held therein by the National Bank. It appeared that a certificate for shares in the Savings Bank was issued in the name of the California National Bank, and that the National Bank received dividends on savings bank stock. At the hearing the National Bank made the point that the Savings Bank stock was not taken by the National Bank in the ordinary course of the business of the National Bank as security for the payment of a debt or otherwise. It was also contended that the National Bank could not in law become a stockholder or incorporator in any other corporation. The Supreme Court of California rendered judgment against the National Bank. 101 *California*, 495.

Edward Winslow Paige, for plaintiff in error.

[1] Statement abridged. Part of opinion omitted. — ED.

George Fuller, *H. E. Doolittle*, and *T. L. Lewis*, for defendant in error.

WHITE, J.

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The Federal questions which therefore arise on the record may be thus stated: 1st, do the statutes of the United States, Rev. Stat. § 5136 *et seq.*, relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation? and, 2d, if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?

As to the first question. — It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank* v. *Townsend*, 139 U. S. 67, 73. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank* v. *Case*, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 128.

On behalf of the plaintiff below it was admitted at the trial that the stock of the savings bank was not "taken as security or anything of the kind," and it is not disputed in the argument at bar that the transaction by which the stock was placed in the name of the bank was one not in the course of the business of banking for which the bank was organized.

2. *The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?*

Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of *Thomas* v. *Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290; *Oregon Railway & Navigation Co.* v. *Oregonian Railway Co.*,

130 U. S. 1; *Pittsburgh, Cincinnati &c. Railway* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24; *St. Louis &c. Railroad* v. *Terre Haute & Indianapolis Railroad*, 145 U. S. 393; *Union Pacific Railway* v. *Chicago &c. Railway*, 163 U. S. 564, and *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60: —

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

This language was also cited and expressly approved in *Jacksonville &c. Railway* v. *Hooper*, 160 U. S. 514, 524, 530.

As said in *McCormick* v. *Market National Bank*, 165 U. S. 538, 549: —

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce* v. *Madison & Indianapolis Railroad*, 21 How. 441; *Pittsburgh, Chicago &c. Railway* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384; *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 48."

The doctrine thus enunciated is likewise that which obtains in England. *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653; *Attorney-General* v. *Great Eastern Railway Co.*, 5 App. Cas. 473; *Baroness Wenlock* v. *The River Dee Company*, 10 App. Cas. 354; *Trevor* v. *Whitworth*, 12 App. Cas. 409; *Ooregum Gold Mining Co. of India* v. *Roper*, (1892) App. Cas. 125; *Mann* v. *Edinburgh Northern Tramways*, (1893) App. Cas. 69.

Applying the principles of law thus settled to the case at bar, the result is free from doubt.

The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers ex-

pressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. *Pearce* v. *Railroad Company*, 22 How. 441, 445. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred. (Cook on Stock and Stockholders, vol. 1, p. 435, note 1 to sec. 316, and authorities there cited.)

In *The Royal Bank of India's Case*, L. R. 4 Ch. 252 (1869), while it was held by the Court of Appeal that, as incidental to the power to advance money on a deposit of shares of stock, a corporation might do such acts as were reasonable and proper for making the security available, it was conceded that a purchase of stock of another company as a speculation would have been *ultra vires*, and, despite acts of ownership exercised by the company, the shares might be repudiated at any time.

Sir C. Selwyn, L. J., said (p. 261): —

"If it could have been shown that it was an act absolutely prohibited by their memorandum of articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification."

Sir G. M. Giffard, L. J., said (p. 262): —

"I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares."

. . . . . .

The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in errror. *National Bank* v. *Whitney*, 103 U. S. 99; *National Bank* v. *Matthews*, 98 U. S. 621. The difference between those cases and one like this was referred to in *McCormick* v. *Market National Bank of Chicago*, *supra*, and it is, therefore, unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified. As was said by this court in *Union Pacific Railway* v. *Chicago &c.*

Railway, 163 U. S. 564, speaking through Mr. Chief Justice Fuller (p. 581): —

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel."

It follows from the foregoing that the judgment of the Supreme Court of California against the bank was erroneous, and it must, therefore, be

Reversed.[1]

MR. JUSTICE HARLAN dissented.

[1] Reaffirmed in *First Nat'l Bank* v. *Hawkins*, A. D. 1899, 174 U. S. 364.

But see *Citizens', &c., Bank* v. *Hawkins*, A. D. 1896, 71 Federal Reporter, 369; *White* v. *Marquardt*, A. D. 1898, 105 Iowa, 145; BARTHOLOMEW, C. J., in *Tourtelot* v. *Whithed*, A. D. 1900, 9 North Dakota, 467, pp. 478–480. — ED.

SAMUEL W. MILBANK *et al.* *v.* THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

SUPREME COURT OF NEW YORK, 1882.

[*Reported* 64 *How. Pr.* 20.]

HAIGHT, J. This action was brought by the plaintiffs, who are the owners of forty-nine shares of the capital stock of the Buffalo, New York and Erie Railroad Company, on behalf of themselves and the other stockholders, to restrain and enjoin the New York, Lake Erie and Western Railroad Company, its agents, officers and directors, from voting at any meeting of the stockholders of the Buffalo, New York and Erie Railroad Company for the election of directors or otherwise.

In the case under consideration, the New York, Lake Erie and Western Company have acquired by purchase the majority of all the stock issued by the Buffalo, New York and Erie Railroad. If its officers are permitted to vote thereon, they can elect a board of directors of their own choosing. It would then be for the interests of the New York, Lake Erie and Western Railroad Company to have the Buffalo, New York and Erie Company managed and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs and their fellow stockholders, and if so they have a right to complain.

My conclusions, therefore, are that while the New York, Lake Erie and Western Railroad Company is the owner of the stock in question, and has the right, while it remains the owner, to collect and receive the dividends thereon, and has the right to sell and dispose of the same, it has not the right to vote thereon, and that the stockholders of the Buffalo, New York and Erie Railroad Company have the right to have it enjoined from so voting in case it threatened to do so. Judgment should be ordered for the plaintiffs, in accordance with the views herein expressed, with costs.

THE PEOPLE *ex rel.* *v.* THE CHICAGO GAS TRUST COMPANY.

SUPREME COURT OF ILLINOIS, 1889.

[*Reported* 130 *Ill.* 268.[1]]

THIS is an information in the nature of a *quo warranto* filed by the Attorney-General against the Chicago Gas Trust Company, summon-

[1] This case is abridged. — ED.

ing the latter to answer to the People of the State by what warrant it exercises certain powers and privileges therein set forth. The Gas Trust Company mentioned was incorporated under the general law for two purposes, as expressed in its articles of association: First, for the purpose of erecting and operating gas works in Chicago or elsewhere; and second, to purchase and hold the capital stock of any gas company in Chicago or elsewhere. The company when it began business sought to exercise the powers claimed under the second clause, only, and for that purpose bought a majority of the shares of all of the stock of all of the gas companies in Chicago, being four in number — which is the usurpation set forth in the *quo warranto.*

MR. JUSTICE MAGRUDER delivered the opinion:

The control of the four companies by the appellee — an outside and independent corporation — suppresses competition between them, and destroys their diversity of interest and all motive for competition. There is thus built up a virtual monopoly in the manufacture and sale of gas.

The fact, that the appellee almost immediately after its organization bought up a majority of the shares of stock of each of these companies, shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago.

The general incorporation act provides, "that corporations may be formed in the manner provided by this act *for any lawful purpose* except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money." The purpose, for which a corporation is formed under the act, must be a *lawful* purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois, it was not organized for a lawful purpose, and all acts done by it towards the accomplishment of such object are illegal and void.

Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy. (2 Addison on Cont. 743; Greenhood on Public Policy, pages 180, 643, 654, 655, 670; *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. St. 173; *Craft* v. *McConoughy,* 79 Ill. 346; *Central R. R. Co.* v. *Collins,* 40 Ga. 582; *Hazelhurst* v. *Savannah R. R. Co.,* 43 id. 13; *Trans. Co.* v. *Pipe Line Co.,* 22 W. Va. 600.)

Judgment reversed.

AMERICAN UNION TELEGRAPH CO. *v.* UNION PACIFIC R. CO.

1880. 1 *McCrary's U. S. Circuit Court Reports*, 188.[1]

MOTION for injunction.

The Union Pacific Railroad Co. was chartered by Congress, with power to "lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with appurtenances." The U. S. endowed the corporation with large grants of lands and bonds to aid in the construction, and imposed upon the corporation the duty of reimbursing the government from the earnings of the road and telegraph line. In 1866 the U. P. R. Co. leased to the Am. Union Tel. Co. all its telegraph lines, wires, poles, &c. for the whole term of the R. R. Co.'s charter and any renewals thereof; subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that plaintiff would fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States. The R. R. Co. received a valuable consideration in stock of the Telegraph Co., which stock the R. R. Co. applied to its own use. In Feb. 1880, the R. R. Co. assumed, of its own motion, to rescind the lease, and to resume possession and control of the property; for which purpose its agents cut certain wires running from plaintiff's offices to the main line. The Telegraph Co. filed a bill; praying, *inter alia*, for an injunction to restrain the defendants from disregarding the above contract, and from interfering with the property covered thereby, and from preventing plaintiff from reconnecting the wires, so as to restore them to their original condition before the same were cut. The defendants answered, affidavits were filed, and a full hearing was had upon the application for injunction (a temporary injunction having been allowed).

Williams & Thompson, and *C. Beckwith*, for plaintiffs.

John F. Dillon, Sidney Bartlett, J. P. Usher, and *A. J. Poppleton*, for defendants.

MCCRARY, CIRCUIT JUDGE.

[The learned Judge *held*, that the power which the charter confers, to "construct, furnish, maintain, and enjoy a continuous railroad and telegraph," was personal, and carried with it a duty and obligation which could not be transferred; that the contract of lease was *ultra vires*, because it transferred from the company property which was necessary to the performance by the company of its public duties; and also because it attempted to transfer certain franchises of the company,

[1] Statement abridged from opinion. Arguments and part of opinion omitted. — ED.

viz. the right to operate a telegraph line and to fix and collect tolls for the use of the same. The remainder of the opinion is as follows:]

This brings me to the question whether the railroad company can be permitted to rescind the contract, and on its own motion to take possession of the lines, offices, and property, without first returning the consideration received therefor from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than $150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to "and the subject-matter of" an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject-matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*. It has been held that even in cases at common law, a contract, *ultra vires*, made between a corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley* v. *Bullard*, 55 Ill. 417.

And in the case of *Thomas* v. *R. Co.* (Supreme Court U. S.), already quoted from at length, Mr. Justice Miller, upon this point, says: "There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations, the rule has been well laid down by Chief Justice Comstock, in *Parish* v. *Wheeler*, 22 N. Y. 404, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely,

the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

The present case, like the New Jersey case in which these remarks were made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it [the contract in question] has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained, while asking to be relieved from the contract, I have no doubt the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right to be heard upon issue joined in a proper proceeding before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal.

It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp* v. *Schroeder*, 45 Mo. 505; *Varick* v. *New York*, 4 Johns. Ch. 53; *Dudley* v. *Trustees*, 12 B. Mon. 610; *Farmers* v. *Reno*, 53 Pa. St. 224; *Sunsing* v. *Steamboat Co.*, 7 Johns. Ch. 162.

The principle settled by these and many other cases is that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds

above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross-bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

ST. LOUIS, VANDALIA, & TERRE HAUTE R. CO. *v.* TERRE HAUTE & INDIANAPOLIS R. CO.

1892. 145 *U. S.* 393.[1]

APPEAL from U. S. Circuit Court for the Southern District of Illinois.

Bill in equity, filed in 1887, by an Illinois corporation against an Indiana corporation, to set aside and cancel a conveyance, or lease, of the plaintiff's railroad and franchises to the defendant for a term of 999 years. The lease was made in 1868. The defendants took possession of the road shortly after the execution of the lease, and have ever since operated it. The bill, as amended, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property. A demurrer to the bill was sustained by the Circuit Court (33 Federal Reporter, 440).

Lyman Trumbull, *John M. Butler*, *Henry S. Robbins*, and *Perry Trumbull*, for appellant.

George Hoadly, for appellee.

GRAY, J. The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of nine hundred and ninety-nine years, set aside and cancelled, as beyond the corporate powers of one or both of the parties.

. . . . . .

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain

[1] Statement abridged. Arguments and part of opinion omitted. — ED.

portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorised by the State which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, above cited.

[After discussing the question whether the contract was beyond the corporate powers of either party, the opinion continues as follows:]

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts, not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy* v. *Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co.* v. *Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co.* v. *St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co.* v. *Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway* v. *Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokage bonds, as in *Drury* v. *Hooke*, 1 Vernon, 412, and *Smith* v. *Bruning*, 2 Vernon, 392; *S. C. nom. Goldsmith* v. *Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service, as in *Morris* v. *McCullock*, Ambler, 433; *S. C.* 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. *Debenham* v. *Ox*, 1 Ves. Sen. 276; *St. John* v. *St. John*, 11 Ves. 526, 536; *Cone* v. *Russell*, 3 Dickinson (48 N. J. Eq.), 208. But Sir William Grant explained them as proceeding upon the ground that the plaintiff was less guilty than

the defendant. *Osborne* v. *Williams*, 18 Ves. 379, 382. And *Morris* v. *McCullock* can hardly be reconciled with his decision in *Thomson* v. *Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall. 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defence in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defence effectual, and when necessary for that purpose. Adams on Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defence. Story Eq. Jur. § 700 *a*, and cases cited; *Simpson* v. *Howden*, 3 Myl. & Cr. 97; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, above cited; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester* v. *Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood* v. *Fisk*, 101 Mass. 363; *Bryant* v. *Peck & Whipple Co.*, 154 Mass. 460; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Jones* v. *Merionetshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers

which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Graham* v. *Birkenhead &c. Railway*, 2 Hall & Twells, 450; *S. C.* 2 Macn. & Gord. 146; *Ffooks* v. *Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory* v. *Patchett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

Decree affirmed.

NATIONAL HARROW COMPANY *v.* HENCH *et al.*

CIRCUIT COURT OF THE UNITED STATES, 1896.

[*Reported* 76 *Fed.* 667.]

ACHESON, Circuit Judge. The plaintiff, the National Harrow Company, seeks an injunction restraining the defendants, Hench & Dromgold, from selling float spring-tooth harrows, harrow frames, and attachments applicable thereto, upon more favorable terms as to price to purchasers thereof than the prices stipulated in two license contracts annexed to the bill, and a decree for the specific enforcement of said contracts, and for an accounting at the rate of five dollars for each harrow, etc., sold in violation of the terms of said license contracts.

The defendants were the owners of two United States letters patent relating to float spring-tooth harrows, under which they had been manufacturing and selling harrows. They joined the combination, and, agreeably to the provisions of the above-recited agreement, they assigned to the New York corporation their patents, and that corporation then issued to the defendants a license to manufacture and sell their old style of harrows. The New Jersey corporation, which was formed in furtherance of the general scheme, issued to the defendants a second license on terms and conditions substantially like the former license. These are the two license contracts here sued on. The following stated provisions are common to both licenses: The defendants agree not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers than as is set forth in the schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers, and that the defendants will not directly or indirectly manufacture or sell any other float spring-tooth harrows, etc., than those which they are thus licensed to sell and market, except for another licensee, and then only of such style as he is licensed to manufacture and sell. They agree to pay to the corporation one dollar upon each float spring-tooth harrow, etc., manufactured and sold by them agreeably to the terms of the license, and the sum of five dollars as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provisions of the license, and the corporation agrees to defend all suits for alleged infringement brought against the licensees. All the licenses issued by the corporation are upon the like terms and conditions.

It will be perceived that the corporation, through whose instrumentality the purposes of the combination are effected, is simply clothed with the legal title to the assigned patents, while the several assignors are invested with the exclusive right to manufacture and sell their old style of harrows under their own patents; but all of them must sell at

uniform prices and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other style or kind of float spring-tooth harrow than they are thus licensed to make and sell. Now, it is quite evident to me, as well by the papers themselves, as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring-tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained. On the contrary, the courts have repeatedly adjudged combinations between a number of persons engaged in the same general business to prevent competition among themselves, and maintain prices, to be against sound public policy, and therefore illegal. Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46, 23 N. E. 530; Merz Capsule Co. *v.* United States Capsule Co., 67 Fed. 414; Nester *v.* Brewing Co., 161 Pa. St. 473, 29 Atl. 102.

I must therefore deny the plaintiff the relief sought.

MINNESOTA *v.* NORTHERN SECURITIES COMPANY.

SUPREME COURT OF THE UNITED STATES, 1902.

[*Reported* 184 U. S. 199.[1]]

ON the 7th day of January, 1902, came the State of Minnesota, by Wallace B. Douglas, its Attorney-General, and moved the court for leave to file a bill of complaint against the Northern Securities Company, a corporation of the State of New Jersey. Thereupon the court directed that notice of such application should be given to the defendant, and set the motion for argument on January 27, 1902, when it was duly heard.

MR. JUSTICE SHIRAS delivered the opinion of the court:

The Northern Securities Company was organized on November 13, 1901, with its principal office at Hoboken, in the State of New Jersey, and the objects for which the corporation was formed, as stated in the articles of incorporation, are to acquire and hold, as investments, the bonds, securities and capital stock of any other corporation or corporations of the State of New Jersey, or of any other State, Territory or country, and while owner of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon; and it is declared that the corporation shall have

[1] This case is abridged. — ED.

power to conduct its business in other States and in foreign countries, to have one or more offices out of the State, and to purchase, hold and convey real and personal property out of the State.

The bill charges that the purpose of the formation of the Northern Securities Company was to place the management and control of the Great Northern Railway Company and of the Northern Pacific Railway Company under one management, and to thus, in effect, establish a consolidation of said railway companies, and defeat and evade the statutes and policy of the State of Minnesota forbidding consolidation of parallel and competing lines of railway.

More briefly stated, the case presented by the charges and prayers of the bill is that the State of Minnesota is apprehensive that a majority of the stockholders respectively of the Great Northern Railway Company and of the Northern Pacific Railway Company have combined and made an arrangement, through the organization of a corporation of the State of New Jersey, whereby such a consolidation, or what is alleged to amount to the same thing, a joint control and management of the Great Northern and Northern Pacific Railway Companies, shall be effected as will operate to defeat and overrule the policy of the State in prohibiting the consolidation of parallel and competing lines of railway, and therefore appeals to a court of equity to prevent by injunction the operation and effect of such a combination and arrangement.

But at once, as we have seen, the court is put upon inquiry whether the parties and persons to be affected by such an injunction are before it. Can such a controversy be determined with due regard to the interests of all concerned by a suit solely between the State of Minnesota and the Northern Securities Company?

As then, the Great Northern and the Northern Pacific Railway Companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if those companies were made parties defendant, the motion for leave to file the proposed bill must be and is

Denied.

HOLDING CORPORATION ILLEGAL? — Louisville R. R. *v.* Kentucky, 161 U. S. 698; De La Vigne Co. *v.* Savings Institution, 175 U. S. 40; George *v.* Central R. R., 101 Ala. 607; Market St. Ry. *v.* Wellman, 109 Cal. 571; Bryne *v.* Electric Co., 65 Conn. 336; Central R. R. *v.* Collins, 40 Ga. 582; Martin *v.* Ohio Stove Co., 78 Ill. Ap. 105; State *v.* Newman, 51 La. Ann. 833; Franklin Co. *v.* Lewiston Co., 68 Me. 43; Small *v.* Matrix Co., 45 Minn. 264; Greenville Compress *v.* Planters' Press, 70 Miss. 669; State *v.* MacDaniel, 22 Oh. St. 354; Farmers' Trust Co. *v.* N. Y. etc. R. R., 150 N. Y. 430; Pearson *v.* Concord R. R., 62 N. H. 537; Penna. R. R. *v.* Com., 7 Atl. 368; Marble Co. *v.* Harvey, 92 Tenn. 115. — ED.

NORTHERN SECURITIES CO. ET AL. *v.* UNITED STATES.

SUPREME COURT OF UNITED STATES, 1904.

[193 *U. S.* 197?]

SUIT brought by the United States against the Northern Securities Co., the Great Northern Railway Co., the Northern Pacific Railway Company, James J. Hill, J. Pierpont Morgan and others, in violation of the Anti Trust Law. It was proved that it was arranged between the individual defendants and various others not defendants to form a holding corporation to take over the most of the stock of both the Great Northern and the Northern Pacific — and to issue in exchange stock of the new company. The individuals who conceived this plan, it was proved, came to a preliminary agreement as to this general scheme. The Northern Securities Company was thereupon organized under the laws of New Jersey with a capacity to issue $400,000,000 of stock in exchange for stocks of other companies which its charter empowered it to hold. Soon after its organization this securities company acquired 96 *per cent.* of the capital stock of the Northern Pacific Company, at the rate of $115 per share, paying for this in its own capital stock at par; and 76 *per cent.* of the stock of the Great Northern Company was bought at $180 per share, payment as before being made in stock of the holding company. The decree below against the defendants, ordering the dissolution of the arrangement, was affirmed in the Supreme Court, five judges to four. An extract from one of the four opinions rendered follows: —

Mr. Justice BREWER: I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended.

There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal

stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purpose as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

Again, there is by this suit no interference with State control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

B. New Corporation.

RICHARDSON *v.* BUHL *et al.*

Supreme Court of Michigan, 1889.

[*Reported* 77 *Mich.* 632.[1]]

Bill by David M. Richardson against Christian H. Buhl and Russell A. Alger to recover certain money paid to defendants under a contract. There was a decree for plaintiff, and defendants appeal. The suit grew out of transactions involved in the organization of the Diamond Match Company. It appeared that the object of the corporation was to buy up the property of all individuals or corporations engaged in the manufacture of friction matches, exacting from the manufacturer, in every case of such transfer, a bond that such manufacturer would not for a term of years engage in, or aid anyone else in, the manufacture of matches in any place where such action might conflict with the interests, or diminish the sales, or lessen the profits, of the Diamond Match Company.

Sherwood, J., delivered the opinion:

I think no one can read the contract in question, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Company. This object is openly and boldly avowed. Not only does this appear in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of Gen. Alger himself avers it, and settles its character beyond question. The organization is a manufacturing company. The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on. The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is

[1] This case is abridged. — Ed.

to accumulate money regardless of the wants or necessities of over 60,000,000 of people.

It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes, and in carrying out its object, that the contract in this case was made between these parties, and which we are now asked to aid in enforcing. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provision in several of our state constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts.

In my judgment, not only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy. The decree at the circuit should be reversed, and the complainant's bill dismissed, with costs.

McCUTCHEON *v.* MERZ CAPSULE CO.

1896. 37 *U. S. Appeals*, 586.[1]

In the U. S. Court of Appeals, Sixth Circuit. Before Taft and Lurton, Circuit Judges, and Hammond, District Judge.

Appeal from U. S. Circuit Court for Eastern District of Michigan.

Bill in equity by Merz Capsule Co. (a Michigan corporation), against the U. S. Capsule Co., R. H. McCutcheon, its president, and various other parties. Cross bill by U. S. Capsule Co. against Merz Capsule Co. Evidence was taken and both causes were heard.

Two corporations (the Merz Capsule Co. and the National Capsule Co.) and two partnerships, severally engaged in the manufacture and sale of hard, empty gelatine capsules, entered into an agreement, dated Nov. 29, 1893, for the combination and consolidation of their several properties and business interests. They agreed to organize a new corporation for carrying on said business; the stock to be divided among the above parties. They agreed to convey their respective plants, machinery, &c. to the new corporation; the value of the real estate to be determined by appraisers if necessary. In payment for these conveyances each party was to receive from the new corporation mortgage bonds to the amount of the appraised value of the property thus conveyed; the mortgage to cover all the property of every kind belonging to the new corporation. It was also agreed that none of the above parties should hereafter engage in the manufacture or sale of empty gelatine capsules.

In pursuance of the above scheme, the parties organized a new corporation under the general law of New Jersey, called the United States Capsule Co. The capital stock of this new company was allotted to the above parties. The property owned and operated by each of the parties in making and selling hard, empty gelatine capsules was valued by appraisers, as provided in the agreement, and conveyances and bills of sale executed to the United States Capsule Company. The instrument of sale executed by the appellee, the Merz Capsule Company, bears date December 21, 1893, and recites a "consideration of $15,000, and other good and valuable consideration." In point of fact this part of the transaction is yet incomplete. No mortgage has been made by the United States Capsule Company, and no bonds have been executed for the appraised value of this property as contemplated by the agreement, though the United States Capsule Company did give to the Merz Capsule Company a certificate, reciting that the latter company was to receive bonds to the amount of the appraised value of its property when the mortgage should be made and the bonds executed.

On the same day that the above-mentioned deed was made and

[1] Statement abridged. Part of opinion omitted. — Ed.

delivered the Merz Capsule Company accepted a lease upon its premises, machinery, plant, etc., in consideration of a nominal rent, the lease to terminate on January 15, 1894, and thereafter continued in the use and occupation of its property, operating the plant for the purpose of working up stock on hand not included in the sale. While thus remaining in the actual possession of its premises and manufacturing plant, the Merz Capsule Company determined to withdraw from its engagements and contracts with the other parties to the agreement, being advised, as the original bill alleges, that the contract then entered upon, and the conveyance in furtherance thereof, were unlawful and in excess of its corporate powers. The motive which led to this repentance is not of great importance, though the evidence seems to make it pretty clear that disappointment in obtaining the control of the new business led to serious doubt as to the validity of the arrangement. This determination was notified to the officers and directors of the new corporation, the stock certificates were tendered back and a complete rescission was demanded. This tender was refused and rescission denied. Having also given public notice of the invalidity of the instrument under which the United States Capsule Company asserted title and right of possession to its manufacturing plant, the Merz Capsule Company resumed its ordinary course of business as an independent manufacturing corporation.

On January 22, 1894, while thus in the full and peaceable possession of its premises and the use of its machinery and appliances, the defendants are shown to have made an entry upon those premises through the officers, agents and servants of the United States Capsule Company, under circumstances of considerable aggravation, for the purpose of removing the machinery and stock of the said Merz Capsule Company, and did actually tear down a part of such machinery and remove a part thereof from the premises, and were only prevented from completely dismantling the factory by an exertion of force.

Thereupon the Merz Capsule Co. filed its original bill against the U. S. Capsule Co., McCutcheon, *et als.*; alleging in effect that the aforesaid agreement was illegal and in excess of corporate powers; that defendants, for the purpose of compelling plaintiffs to carry out the scheme, threatened further trespasses, for which the plaintiffs' remedy in damages would be inadequate; and praying that the above agreements and conveyances should be cancelled, and defendants enjoined from interfering with the possession of plaintiffs' property and premises.

The U. S. Capsule Co. answered and filed a cross bill, setting up the said agreements and conveyances as legal instruments, and praying for their specific performance.

Upon full proof the U. S. Circuit Court made a decree, restraining the U. S. Capsule Co. from the commission of further trespass, declaring the several agreements *ultra vires* and illegal under the law of Michigan, and decreeing that the title to the disputed property is

quieted in the Merz Capsule Co. The cross bill of the U. S. Capsule Co. was dismissed.

The U. S. Capsule Co. *et als.* appealed.

Henry M. Campbell (*Russel & Campbell* were on the brief), for appellants.

Edwin F. Conely, for appellee.

LURTON, J. [The Court *held*, "that the agreement of Nov. 29, 1893, as to the Merz Capsule Company, and the subsequent conveyance and bill of sale to the United States Capsule Company made in furtherance of that agreement, are inoperative, null and void, as in excess of its corporate powers." "Being *ultra vires*, the consent of its stockholders cannot legalize or vitalize the transaction." The opinion then proceeds as follows:]

The final objection urged by the appellants is that, if the agreement between the Merz Capsule Company and its associates is subject to the objection that it was unauthorized by its organic law and contrary to the public policy of Michigan, the objection cannot be urged by that corporation as a ground for affirmative relief in a court of equity. Undoubtedly, if the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, and has not been repudiated by the defendant, neither a court of law nor of equity will lend its active assistance to the recovery of property or money paid on such a contract, or aid in bringing about its surrender or cancellation. The doctrine of the courts applicable was stated very aptly by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company* v. *Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393, 407, when he said: "The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall. 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298. While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose."

But this rule, by which the defense of *particeps criminis* is sanctioned by courts, as stated by Lord Truro in *Benyon* v. *Nettlefold*, 3 Macn. & Gord. 94, 101, and approved by Lord Selborne in *Ayerst* v. *Jenkins*, is rested "on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." But in the case last cited Lord Selborne notices a very obvious limitation, by saying: "When the immediate and direct effect of an estoppel in

equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy." L. R. 16 Eq. 275, 283.

The contract in the case at bar between the parties *in pari delicto* is in a large degree still executory. Though a deed and bill of sale have been executed and delivered in furtherance of the original agreement, possession has not been surrendered, and the bonds to be delivered in payment have neither been delivered nor executed. The conveyee under the deed has indeed applied to this court, through its cross bill, for the specific performance of the agreement by being placed in possession under the deed, and for an accounting with the appellee. There is an obvious distinction between the attitude of a complainant asking relief against an unexecuted agreement, illegal for reasons not appearing upon its face, and where it is sought to recover back money or property paid upon a contract fully executed. The cases stating this distinction are referred to and commented upon by Lord Cottenham, in *Simpson* v. *Lord Howden*, 3 Myl. & Cr. 97 *et seq.*, by Lord Selborne, in *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, and by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company* v. *Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393.

In *Whaley* v. *Norton*, 1 Vernon, 482, 483, the Master of the Rolls said "that there would be a difference in these cases between a contract executed and executory, and that this court would extend relief as to things executory, which if done, it may be might stand." The case of *Spring Company* v. *Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted and he is desirous of rescinding it, provided the contract was not one *malum in se*.

The specific performance sought under the cross bill has rendered necessary the expression of a definite opinion as to the validity of the contract thus set up by the United States Capsule Company. In view of this opinion, necessitating an affirmance of the decree, as far as it dismissed the cross bill, ought we to stop at this point and decline to grant any part of the relief sought by the appellee? The Merz Capsule Company does not seek to recover back either property or money paid or delivered under its agreement or deed. Before actually surrendering possession of its premises, machinery and appliances, or transferring its patents and processes, it repudiated the whole scheme and tendered back all that it had ever received, and has kept that tender good. But it has neither lost possession nor received the bond payment it was entitled to receive. Having given notice of its purpose to go no further in an illegal scheme, it remained in the peaceable possession of its property and in the ordinary conduct of its business. Without resorting to legal proceedings, the United States Capsule Company sought to obtain possession of the property of the recalcitrant grantor, and, when pre-

vented by force from accomplishing its unlawful object, avowed its purpose by a repetition of the trespass to obtain a possession which it could not secure by a resort to legal procedure. The effect of a continuance of these unlawful methods to obtain possession, as shown by the pleadings and proof, would be most injurious to the business of the complainant, and the remedy at law inadequate. Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality.

The decree of the court declaring the illegality of the agreement of November 29, 1893, and of the deed of December 21, 1893, and restraining the appellants from interfering with the title or possession of the appellee under color thereof, should be, and accordingly is,

Affirmed.

BAILEY, J., IN DISTILLING AND CATTLE FEEDING CO. *v.* THE PEOPLE.

1895. 156 *Illinois*, 448, p. 486, pp. 490-492.[1]

BAILEY, J. . . . There can be no doubt, we think, that the Distillers' and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was therefore illegal. No one who intelligently considers the scheme of this trust, as detailed in the information, can for a moment doubt that it was designed to be, and was in fact, a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition, and to be able to dictate the amount to be manufactured and the prices at which the same should be sold, and thus to create, or tend to create, a virtual monopoly in the manufacture and sale of products of that character.

. . . . . .

[After citing authorities.]

Many other decisions of similar import might be referred to, but the foregoing will suffice. They are sufficient, in our opinion, to establish the conclusion, in which the courts of the country, with very great unanimity, seem to concur, that trusts of the character of the one described in the information as existing prior to the organization of the defendant corporation are against the policy of the law, and are therefore illegal and void.

But the defendant contends that, while this may all be so, the change in organization from an unincorporated association to a corporation, and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations, by means of which the control of those properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, have purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal, rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of all the capital stock of the corporations and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation, and its board of directors. The

[1] This was a proceeding by *quo warranto* brought in the name of the People of the State of Illinois, by the Attorney-General, against a corporation organized under the general incorporation law of Illinois. In the court below judgment was rendered against the corporation, ousting it from its franchises. From that judgment the defendant corporation appealed. — ED.

conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before. The trust, then, being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country — over production and prices — and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.

But it is urged that the defendant, by its charter, is authorized to purchase and own distillery property, and that there is no limit placed upon the amount of property which it may thus acquire. By its certificate of organization it is authorized to engage in a general distillery business in Illinois and elsewhere, and to own the property necessary for that purpose. It should be remembered that grants of powers in corporate charters are to be construed strictly, and that what is not clearly given is, by implication, denied. The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its charter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the State by *quo warranto*, and we are of the opinion that, upon the facts shown by the information, the judgment of ouster is clearly warranted. It will accordingly be affirmed.

Judgment affirmed.

TRENTON POTTERIES CO. *v.* OLIPHANT.

1899. 58 *New Jersey Equity*, 507.[1]

In the Court of Errors and Appeals, on appeal from a decree advised by GREY, V. C., 56 New Jersey Equity, 680.

Bill in equity by Trenton Potteries Company, a New Jersey corporation, against Oliphant *et al.*; setting up the sale, by the defendants to the plaintiff, of the Delaware pottery and its good will and business; alleging that the defendants had covenanted not to engage in the business of manufacturing pottery ware except under certain specified circumstances; and further alleging that the defendants were manufacturing pottery ware in breach of their covenants. The bill prayed that the defendants might be enjoined from manufacturing pottery ware, save in the cases excepted from the covenants.

The case was heard before GREY, V. C., on bill, answer, and proofs.

The following facts appeared:

In the latter part of the year 1890, and in the month of January, 1891, there were engaged in the business of the manufacture of sanitary pottery ware (under which general designation were included sinks, urinals, water-closets and the like), eight different potteries, the Equitable, Enterprise, Crescent, Delaware, Empire, Willet's, Maddock's, and the Maryland. All except the Maryland were located in Trenton, New Jersey; the Maryland was at Baltimore. These eight potteries comprised all of the potteries in the United States which were then engaged in the production of sanitary ware (except a small concern at Wellsville, Ohio), and had formed an association called the American Sanitary Potters' Association, for the purpose of securing uniform action as to the prices of the ware which they manufactured and sold. The prices at which the goods produced by the associated concerns should be sold were fixed by a majority vote of the several members. Each pottery had its individual vote in the association, and the vote of the majority controlled, and all were by their agreement bound to sell only at the prices that the association should fix. The several potteries comprising the association were separately and independently owned; all of them were in partnership or individual ownership, except the Crescent, which was a corporation.

Certain promoters then obtained "options" from the owners of the Enterprise, Empire, Crescent, Equitable, and Delaware potteries; giving a right to purchase these various properties and their business.

The Trenton Potteries Company, the complainant in this suit, was by a certificate filed May 28, 1892, incorporated under the General Corporation Act of New Jersey. Its capital stock was fixed to be

[1] Statement abridged from the report in 56 New Jersey Equity, 680. — ED.

issued, $1,250,000 of preferred stock and $1,750,000 of common stock. Its objects were stated to be

"to manufacture, buy, sell, and trade in pottery and earthenware and other like products, and in all materials commonly or conveniently used, manufactured, bought and sold in connection therewith, or necessary or convenient in and about the transaction of the said business."

The corporation was organized by the aforesaid promoters, for the purposes hereinafter stated.

July 6, 1892, final conveyances were executed by the owners of the five above-named potteries, to certain promoters, who thereafter conveyed to the Trenton Potteries Co. The sellers also entered into covenants with the purchasers and their assigns, restraining themselves from engaging in the same business. Messrs. Oliphant *et al.* agreed that they would not, nor would either of them directly or indirectly engage in the business of the manufacture of pottery ware, . . . within any State in the U. S. or within the District of Columbia, except in the State of Nevada and the Territory of Arizona, for a period of fifty years; and that this contract should enure to the benefit of, and might be enforced by the Trenton Potteries Company, its successors or assigns.

It was in evidence that, on acquiring control of five of the eight members of the association, the newly formed corporation (The Trenton Potteries Co.) preserved the individuality of each of the potteries which it bought, so that the new corporation had five votes in the association instead of one.

The Vice-Chancellor found, in substance, that the object aimed at by the parties in forming the plaintiff corporation and purchasing the five potteries was to secure power to suppress competition, and to control the production and dictate the prices of sanitary ware pottery; not only as to such pottery made by the plaintiff company, but also as to such pottery when made by any of the members of the American Sanitary Potters' Association.

The Vice-Chancellor advised a decree that the plaintiff's bill be dismissed.

Plaintiff appealed.

Wm. M. Lanning, Garret D. W. Vroom, and *Lewis Cass Ledyard* (of New York), for appellant.

Samuel D. Oliphant, Jr., Richard V. Lindabury, and *Joseph H. Choate* (of New York), for respondents.

MAGIE, C. J.

[The court *held, inter alia,* that the contract not to engage in the same business was valid and enforceable, so far as it related to carrying on business within the State of New Jersey.]

. . . . . .

It remains to consider whether the contracts in question are otherwise against the public policy of our state. The learned vice-chancellor held them to be opposed to the public interest, because he

conceived that they tended to create a monopoly in the business of manufacturing sanitary pottery ware. This effect he deemed established by the proofs that appellant, simultaneously with its purchase from respondents, also purchased four other plants used in the manufacture of such ware in Trenton, and the property, business, and good will of their owners, and took from each of those vendors contracts restraining them from engaging in the business of manufacturing pottery ware, substantially identical with the contracts taken by it from respondents. The contracts procured from respondents he deemed to be part of a scheme to control the production, distribution, and sale of sanitary pottery ware and to exclude competition therein. Such ware he declared, on the authority of the promoters of appellant, to be a necessity of life.

The scheme held to be reprehensible was found in the situation disclosed in the proofs. Respondents, as owners of the business sold to appellant, had, several years before the sale, united with the owners of seven other potteries in Trenton, which made, among other things, sanitary pottery ware, in an association called the "American Sanitary Potters' Association." That association had in some way controlled the prices at which such ware produced by eight members (counting the owners of each pottery as one member) should be put upon the market. The action of the association in that regard was determined by a majority of its eight members. By its purchases appellant acquired the interest of five of the members, and seems to have been permitted to cast a vote for each in controlling the action of the association. After appellant's purchases prices were so controlled for some time and until the association fell to pieces.

Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production or by restriction on distribution, or by express argument to maintain specified prices, are without doubt opposed to public policy. The contract of the sanitary potters' association in this regard was inimical to public interest when respondents were members of it, and none the less so when appellant acquired the property of five of its members. However solemnly the members of that association may have obligated themselves to obey the behests of the majority in respect of the control of prices of their ware, no court would have enforced their agreements or awarded damages for any breach of them.

But the contracts by which appellant acquired the property and business of respondents and of four other members of the association contained no term stipulating for the continuance of the association or for the enforcement of any objectionable agreements it had entered into. At the most, so far as appears, the contemporaneous purchases by appellant gave it an opportunity to use the majority vote in the association for such control of prices as its agreements provided for. Although the control of the voting majority of the

association may have been one of appellant's motives for making its simultaneous purchases, it is inconceivable that any one of the five vendors could have repudiated his contract to sell to appellant on the ground that such sale, if consummated, would enable appellant to obtain such control. The public interest would be amply protected by invalidating the agreement of the association for the control of prices and the disconnected agreement of sale would be enforced as other contracts.

It is further urged that the simultaneous contracts procured by appellant create, or tend to create, a monopoly, because they stipulate for the removal of many competitors in the business of manufacturing sanitary pottery ware. The owners of five of the eight potteries in Trenton manufacturing that kind of ware (and there were but few, if more than one, elsewhere) thereby agreed not to engage in that business for a long period of time and over a great extent of country. The engagement of respondents in that respect has been found not to be an improper restraint of trade nor inimical to public policy on that ground, but a contract partially enforceable upon respondents, if not otherwise objectionable. The engagements of the other vendors who sold their properties and business to appellant are similar in terms to that entered into by respondents, and furnish a reasonable protection to appellant of the business and good will purchased by it of each of them. Each sale and each incidental contract against competition are, for reasons before given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made, they excluded from engaging in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture?

It is to be observed that the contracts of respondents and the other vendors to appellant restricted them from engaging in the business of manufacturing, not sanitary pottery ware alone, but all pottery ware. The proofs show that a large number of persons are engaged in manufacturing pottery ware in various parts of the country, and that the contracts in question would exclude from competition a very small proportion of them. But as the proofs also show that the main purpose of appellant was to engage in the manufacture of sanitary pottery ware, I have stated the proposition in a more restricted form.

Whether sanitary pottery ware has become a necessity of life is open to question. It is certain that many persons manage to exist without using it. But if its use is of importance to health and comfort, and a considerable and increasing number of persons desire to acquire and use it, the public may have such an interest in its manufacture and sale that public policy will justify judicial interference and refusal to enforce illegal combinations to enhance its price. The elimination of competition may produce that result. The contracts in question were not intended to withdraw, and do not appear to

have withdrawn, from work a single workman in that industry. They restrain a comparatively small number of capitalists who had previously employed their capital in such manufacture from continuing so to do. The entire capital of the country, except theirs, is free to be employed in the manufacture. There seems no ground for the claim that we should refuse to enforce respondents' contracts by injunction when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains.

The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the purchaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions (if such could be imposed) upon the acquisition of such property and its use when so acquired, courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish or even to exclude competition.

But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time

at least, destroy competition. Contracts for such purchases cannot be refused enforcement.

Since contracts by individuals and by corporations having legislative authority, for the purchase of competing plants and business, may be made and are enforceable, although as a result thereof competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased, cannot be declared by the courts to be repugnant to public policy. The interference with competition resulting from such purchases under legislative permission, being found not to invalidate contracts for such purchases, the like interference by contracts reasonably required for the protection of the purchaser cannot be held to invalidate them.

The result is that the decree appealed from must be affirmed as to Richard C. and Henry D. Oliphant, but as to the other respondents it must be reversed and a decree be made enjoining them according to the prayer of the bill within the State of New Jersey.

OAKDALE MANUFACTURING COMPANY *et al.* *v.* GARST.

SUPREME COURT OF RHODE ISLAND, 1894.

[*Reported* 18 *R. I.* 484.]

STINESS, J. The complainants seek an injunction against the respondent, to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine, for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to unite and form a corporation for the purpose of carrying on their business together. To this end, all the parties turned in the stock, machinery, accounts and good will of their respective concerns taking an amount of stock in the corporation represented by such valuation. After this one entered the same business again, and claims the right to do so upon the following grounds, viz.: That the contract is void as a combination to stifle competition.

Undoubtedly there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule.

Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither monopoly nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition. We think the complainants are entitled to the relief prayed.

PEOPLE *ex rel.* AMERICAN ICE COMPANY *v.* NUSSBAUM, REFEREE.

SUPREME COURT OF NEW YORK, 1900.

[*Reported* 66 *N. Y. Suppl.* 129.]

THE American Ice Company, of New Jersey, was organized March 11, 1889, with a capital stock of $60,000,000. This company thereupon exchanged its shares for the shares of the Knickerbocker Ice Company and the Consolidated Ice Company. Thereby it was proved the American Ice Company got a virtual monopoly of the ice supply available to the people of New York. As a direct result of this consolidation, the retail price of ice in New York was raised 100 per cent. This is an action under the New York Anti-Trust Law.

CHESTER, J. While the law permits one corporation to buy and hold stock of another corporation, the attorney-general sufficiently alleges that this was done in this case for an unlawful purpose. He alleges, in effect, that the purpose of the alleged agreement or arrangement between these companies to so combine their interests was to create a monopoly in the ice business, and destroy competition in the production, supply, and sale of ice in the city of New York, in violation of law, and that in pursuance of such agreement and arrangement the American Ice Company acquired the stock of the other two companies. I think, therefore, that he brings the case within the provisions of the law which condemns every contract, agreement, arrangement, or combination having for its purpose the creation or maintenance within this state of a monopoly of the production or sale of an article of common use, or the restraining or preventing competition in the price or supply of any such article, and that his written application is sufficient to justify the order for examination which has been granted.

Motion vacated.

NEW INCORPORATION LEGAL? — U. S. *v.* E. C. Knight, 156 U. S. 1; American Biscuit Co. *v.* Klotz, 44 Fed. 721; Carter-Crume Co. *v.* Puerring, 86 Fed. 439; U. S. *v.* Nelson, 52 Fed. 646; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302; Harding *v.* Glucose Co., 182 Ill. 551; Bishop *v.* Preservers' Co., 157 Ill. 284; State *v.* Cotton Oil Co., 40 La. Ann. 8; Central Shade Co. *v.* Cushman, 143 Mass. 353; Anchor Co. *v.* Hawkes, 171 Mass. 101; Richardson *v.* Buhl, 77 Mich. 632; Wooden Ware Assn. *v.* Starkey, 84 Mich. 76; National Lead Co. *v.* Grote Store, 80 Mo. Ap. 247; Ellerman *v.* Chicago Junction R. R., 49 N. J. Eq. 217; Meredith *v.* Zinc Co., 37 Atl. 539; Trenton Potteries *v.* Oliphant, 58 N. J. Eq. 507; National Harrow Co. *v.* Bernent, 21 N. Y. Ap. D. 290; P. *v.* Duke, 40 N. Y. S. 11; McBurney *v.* White Lead Co., 9 Week. Bul. 316; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484. — ED.

PEOPLE *v.* DUKE ET AL.

SUPREME COURT OF NEW YORK, 1896.

[44 *N. Y. Supp.* 336.[1]]

THIS indictment charged the defendants with the crime of conspiracy. It alleged that, at the time specified, they were officers and agents of a corporation called the American Tobacco Company; that the greater portion of the cigarettes manufactured and vended in the United States were made and vended by them; that they (the defendants) and others conspired unlawfully to commit an act injurious to trade and commerce, — that is to say, to monopolize the entire business of making and vending cigarettes throughout the United States, and to exclude every other person from engaging in such business by refusing to sell to those who would not deal with them exclusively.

MR. JUSTICE FITZGERALD: It is further claimed that, because defendants are directors and agents of a private corporation, they had a perfect right to do all of the acts alleged against them. A very wide latitude must, indeed, be accorded to the managers of a vast private enterprise, lawfully organized, and it is exceedingly difficult to fix the bounds beyond which they may not lawfully go. They are certainly entitled to reap all the advantages which skill, experience, large investment, enterprise, and splendid facilities afford them over less favorably equipped competitors; and if, by such means, vast trade is attracted, to the detriment of mere business rivals, it would be difficult to see how injury to the public could arise. The principle established by the adjudged cases appears to be that, where actual or possible public injury does not arise from the business methods of individuals or corporations, the natural law of supply and demand may be depended upon to protect the public welfare. A trading corporation is entitled to all the advantages it can secure under fair and free competition, but its officers and agents may become criminally liable if they confederate to secure a monopoly by threats and menaces directed against competitors, to force and coerce them to relinquish the rights to the fullest enjoyment of which all are entitled. If, then, the proof in the case at bar should establish the allegations of the indictment, might not the refusal to sell to jobbers and dealers except upon the required conditions be properly found to constitute menace, coercion, and intimidation? And if such methods or devices were resorted to by defendants to restrain lawful trade and commerce, and create a monopoly, are they not guilty of conspiracy? Demurrer disallowed, with leave to defendants to plead over.

[1] This case is abridged. — ED.

WHITWELL *v.* CONTINENTAL TOBACCO CO. ET AL.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, 1903.

[125 *Fed. Rep.* 454.[1]]

A MANUFACTURER, a corporation, and its employé restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it under the Anti Trust Act for treble damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again.

SANBORN, Circuit Judge: The tobacco company and its employé sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills.

[1] This case is abridged. — ED.

SECTION III.

Rights and Remedies of Creditors in Cases of Consolidation, Merger, or Transfer of Assets to another Corporation.

HURD v. NEW YORK AND COMMERCIAL STEAM LAUNDRY CO.

1901. 167 *New York*, 89.[1]

THE defendant company was incorporated Nov. 3, 1890. Thereupon a corporation referred to as the Commercial Company and an unincorporated concern referred to as the New York Company were consolidated with the defendant corporation; and the business previously conducted by the two former companies was taken over and continued by the defendant. April 30, 1891, the plant and machinery of the Commercial Company, valued at $20,000, were transferred to the defendant for a consideration of $20,000, to be paid in the capital stock of the defendant corporation, which was ultimately to be distributed among the stockholders of the Commercial Company. This transfer of the plant and machinery of the Commercial Company was not made in the usual course of business. The effect of such transfer was to terminate the regular business of that company, and it was made and accepted by the defendant for that purpose.

Prior to the so-called consolidation the Commercial Company was indebted to Eliza N. Hall on a disputed claim, upon which judgment was obtained against that company, on Aug. 9, 1893, for $4,381.16. Execution issued thereon was returned unsatisfied. Thereafter an action was brought by Hall, as judgment creditor, against the Commercial Company for the sequestration of its property, and a judgment was had therein appointing the present plaintiff receiver of said company. This action is brought by the plaintiff, as such receiver, to compel an accounting by the defendant as to the assets received by it from the Commercial Company and to recover a money judgment.

The foregoing are a portion of the facts found by the trial court, upon which it predicated the legal conclusions that the transfer by the Commercial Company was fraudulent and void against its creditors and against the plaintiff; also that the defendant corporation was chargeable with notice of the existence of the claim of Hall and took the assets of the Commercial Company charged with all its debts.

The trial court directed judgment in favor of the plaintiff for the amount of the Hall judgment and costs. This judgment was reversed in the Appellate Division by a divided court. Plaintiff appealed.

[1] Statement abridged. Arguments and part of opinion omitted. — ED.

Edwin C. Dusenbury, for appellant.
W. W. Westervelt and *Delos McCurdy*, for respondent.
WERNER, J.

. . . . . .

Stripped of all speculations and assumptions we have here the case of a corporation which is in debt. While so indebted its officers enter into an agreement under which substantially all of its assets are transferred to another corporation which is thereafter to continue the business. In payment of this transfer the purchasing corporation issues some of its capital stock, not to the selling corporation, nor yet to its officers as trustees, but to the principal stockholder as an individual. When the creditor undertakes to assert his rights the stock is reissued to the late treasurer of the selling corporation, who has become the president of the purchasing corporation, and he distributes the same without regard to the claims of creditors. This is the transaction which is sought to be defended under the authority of *H. & G. M. Co.* v. *H. & W. M. Co.* (127 N. Y. 252). A mere glance at that case will suffice to emphasize the difference between it and the case at bar. There the question was, primarily, whether the plaintiff could recover upon a promissory note which it took in payment for stock of the defendant corporation, in consideration of the transfer to the latter of the rolling mill, machinery, etc., of the former, and, incidentally, whether the taking of this stock was *ultra vires* under a charter which provided that "it shall be unlawful for such company to use any of its funds in the purchase of any stock in any other corporation." (Laws 1848, chap. 40, sec. 8.) It was held that the plaintiff could recover, as the transaction was not *ultra vires*, because the statute did not forbid the taking of stock in payment of a debt, and also, that if it were *ultra vires* the defendants were in no position to interpose a plea. The statement in the opinion in that case, to the effect that a corporation has power, with the consent of all of its stockholders, to sell its plant to another corporation and to retire from business, taking payment in the stock of the other corporation, was entirely correct as qualified by the facts before the court. No rights of creditors intervened, the stockholders had all consented, and the question arose between the parties to a promissory note given for some of the stock. Here we have an entirely different condition of things. The stockholders consent but the creditor objects. When he demands payment of his claim he is referred to the empty shell which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation. When he seeks to follow this fund he is told that the capital stock of the defendant in the hands of those who may be *bona fide* holders is his only resort. This is not the law. In the recent case of *Cole* v. *M. I. Co.* (133 N. Y. 164) this court decided that a transaction similar to the one under review was illegal as against creditors. In that case the plaintiff was a creditor of the

National Mining Company. During the pendency of an action to establish the claim of the former the latter transferred all its property and assets to the defendant, the Millerton Iron Company, which promptly executed a mortgage covering all of its property, so that when the plaintiff obtained his judgment and issued his execution he found nothing to levy upon. In that case the defendant trust company, which took the mortgage in good faith and, therefore, occupied a much better position than the defendant herein, appealed to this court from the order of the Appellate Division reversing the judgment dismissing the complaint. In dismissing the rights of the parties, Judge Finch, speaking for this court, said: "As against the creditor the transfer to the Millerton Company was illegal and in fraud of his rights. The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against stockholders and all transferees, except those purchasing in good faith and for value. (*Bartlett* v. *Drew*, 57 N. Y. 587; *Brum* v. *M. M. Ins. Co.*, 16 Fed. Rep. 143; Morawetz on Corp. sec. 791.) The Millerton Company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National Company, to make it utterly insolvent, and to deprive its creditors of the trust fund upon which they had the right to rely, and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee." The only difference between the transferee in that case and in this, is that there it gave up nothing except its promise to pay the indebtedness of the transferrer, and here it gave up stock, not to the transferrer, but to an individual stockholder who did not undertake to pay the corporate debts. Neither became a purchaser for value under such circumstances. Other authorities might be referred to in support of the position above outlined, but the case just cited is so directly in point that a further discussion seems useless.

The order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs in all courts.

Ordered accordingly.

EWING *v.* COMPOSITE BRAKE SHOE CO.

1897. 169 *Massachusetts*, 72.

CONTRACT, in two counts, upon a special promise and upon an account annexed. Trial in the Superior Court, before *Lilley*, J., who, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant;

and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

W. R. Bigelow, for the plaintiff.

C. A. Taber, (*E. E. Kent* with him,) for the defendant.

LATHROP, J. The plaintiff was a creditor of a Maine corporation to the amount of $787. This corporation ceased to do business, and the stockholders, together with at least one other person, formed a new corporation with a different name under the laws of Massachusetts. The new corporation is the defendant in this case. It took all the assets of the old corporation except its books, but it did not assume to pay all of the debts of the old corporation, although there was evidence that one Whitcomb, who was the manager of both of the corporations, told the plaintiff that the new company would be liable for the debts of the old. It is obvious, however, that where a new corporation is formed, the creditors of the old corporation do not, without something further being done, become creditors of the new corporation. They have an equitable right to follow the assets of the old corporation; but they cannot maintain an action at law against the new corporation, for there is no privity of contract. To render the new corporation liable there must be a new contract made, such as will amount to a novation. See Moraw. Corp. (2d ed.) §§ 808 *et seq.*

If a new contract is made between a creditor of the old corporation and the new corporation, the latter is liable only on the new contract. In the case at bar, according to the plaintiff's testimony, the new contract which he made with the manager was that he should receive two hundred dollars in cash and five shares of the capital stock of the new corporation at the par value of one hundred dollars a share, in full payment of his claim of seven hundred and eighty-seven dollars. He received the money and a certificate of five shares of the capital stock. He now seeks to rescind the new agreement, on the ground that the capital stock of the new corporation was not fully paid in before it began business. But even if this is so, he cannot hold the new corporation for the original debt, as it never contracted to pay it, except in the manner in which the agreement has been performed.

[Remainder of opinion omitted.]

Exceptions overruled.

NEW BEDFORD R. CO. *v.* OLD COLONY R. CO.

1876. 120 *Massachusetts*, 397.[1]

COLT, J. The St. of 1874, *c.* 55, authorizes the defendant corporation "to purchase the rights, franchise, and property of the Middleborough and Taunton Railroad Corporation," and gives to the latter

[1] Statement omitted. — ED.

corporation, upon such purchase, power to convey to the Old Colony Railroad Company, "its franchises and property, and all the rights, easements, privileges, and powers granted to it." It also declares that upon such conveyance the defendant corporation shall "have and enjoy all the rights, powers, privileges, easements, franchises and property of said Middleborough and Taunton Railroad Corporation, and be subject to all the duties, liabilities, obligations, and restrictions to which said last named corporation may be subject."

This action is to recover damages for a tortious act of the Middleborough and Taunton Railroad Corporation, for which it was liable previously to the time of the purchase; and the questions raised by the demurrer are, whether the defendant is liable for that act, and, if so, whether an action can be maintained directly against it, or must be first brought against the other corporation.

The answer to these questions depends upon the intention of the Legislature, to be deduced from the terms of the statute and the manifest purpose of the act. The language is broad enough to place the defendant in all respects in the position of the other corporation, upon the conveyance and assignment provided for. It is equivalent to an amalgamation of the two; all the franchises, privileges, and powers are transferred, without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding, and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation, except, perhaps, so far as such existence may be necessary in order to hold and distribute the consideration received for the sale, or to meet the requirements of the statute which prolongs the life of all corporations for three years after dissolution, for the purpose of enabling them to close their concerns. Gen. Sts. *c.* 68, § 36. It operates as a dissolution of the corporation by force of the statute and of the assent manifested by the sale. *Lauman* v. *Lebanon Valley Railroad*, 32 Penn. St. 42.

In view of these results, it would be a narrow construction to hold that when the statute subjects the purchasing corporation "to all the duties, liabilities, obligations, and restrictions" of the other, it only intended to impose those obligations which the corporation owed the public under its charter and the laws of the Commonwealth, and that the property transferred was only that by which it served the public in the exercise of its franchise. In the absence of express provision, it cannot be inferred that it was the intention of the act to impair claims of third parties for existing liabilities, or to shorten the time within which the remedy must be pursued. The question is not whether the statute compels the creditor to accept the defendant corporation as a new debtor against his will, or an injured person to resort to a stranger for satisfaction, but whether it empowers the

creditor or the person injured to resort, if he chooses, in the first instance, to the corporation which, by the terms of the statute, is made liable to him. And we are of opinion that it does, and that the privity necessary to support this action is created by the statute and the purchase and conveyance under it.

Demurrer overruled.

INDIANAPOLIS, CINCINNATI AND LAFAYETTE R. CO. *v.* JONES.

1868. 29 *Indiana*, 465.

APPEAL from the *Decatur* Common Pleas.

FRAZER, J. — This case is here solely upon a question of the sufficiency of the evidence. It was a suit to recover the value of a steer, alleged to have been killed by defendant's cars, in *April*, 1865, in *Decatur* county, the railroad not being fenced. The answer was the general denial. The issue was found for the plaintiff, and his damages assessed at $100. The question made is without any substantial merit, being purely technical. It must, however, be determined according to law. It was the cars of the *Indianapolis and Cincinnati Rail road Company* that killed the steer, since which time that company's road has been consolidated with the road of the *Lafayette and Indianapolis Railroad Company*, under the laws of this State, and the corporation thus formed is the appellant, the *Indianapolis, Cincinnati and Lafayette Railroad Company.*

It is disputed that the consolidated company, the appellant, is liable for the value of the steer, and *Evansville* v. *The Evansville Gas Light Co.*, 26 Ind. 447, is relied on as an authority to sustain the proposition. The case seems to us to have no bearing whatever upon the question.

By the consolidation, both of the old companies ceased to exist separately, and all their effects and franchises were vested in the new company. The two corporations became merged in one. We cannot imagine how the *Indianapolis and Cincinnati Railroad Company* could afterwards be sued. Upon whom would process be served? It ceased to have any officers or agents. It ceased to be a separate legal entity. Instead of two, there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court. But what are the rights of creditors and persons upon whom torts have been committed by the vanished corporations? A dead man may have an administrator to represent his estate and answer to suits, but a corporation lawfully disappearing thus, has no estate to be administered. Its assets have lawfully vested in the new consolidated corporation. Must lawful claims be lost, then? That result cannot follow. The legislature has chosen to make no

provision upon the subject, and the industry of counsel, as well as our own examination of the books, has failed to discover any direct authority upon the question before us. The analogies of the law, too, afford little aid in its solution. We regret to be compelled to decide it without a more thorough argument. Giving it, however, the best consideration of which we are capable under the circumstances, we have reached the conclusion that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continued in it, under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name. This doctrine seems to spring from the necessities of justice, and, so far as we are able to foresee, cannot result in wrong or embarrassment. To avoid variance in proof, the complaint should, in this case, have averred the facts, which it did not; but it seems to us that it could have been cured by amendment on the trial, and that the variance is therefore not available to the appellant here.

The judgment is affirmed, with ten per cent. damages and costs.

VILAS *v.* MILWAUKEE & PRAIRIE DU CHIEN R. CO.

1863. 17 *Wisconsin*, 497.

APPEAL from the Circuit Court for *Dane* County.

In July, 1856, the Milwaukee & Mississippi Railroad Company became liable, upon contract, to pay the plaintiff ten shares of its full paid stock, in consideration of the plaintiff's having caused certain lands in Prairie du Chien in this state, of which he claimed to be the equitable owner, to be conveyed to said company by the persons who held the legal title to them. The stock was never paid to him, though demanded of said company in May, 1857. At the time it became due, and at the time of such demand, the value of said stock was $810. In January, 1861, by virtue of chapter 308, General Laws of 1860, certain persons who had before then purchased the road of the said Milwaukee & Miss. R. R. Co., filed, in the office of the secretary of state of this state, a certificate, signed by them, specifying, among other things, that they formed a corporation by the name of the *Milwaukee & Prairie du Chien Railway Company*, and that as such they were authorized to purchase and hold the franchises of said Milwaukee and Miss. R. R. Co.; and thereby said *Milwaukee & Prairie du Chien Railway Company* became, and have ever since been, a body politic and corporate by that name. The complaint alleges that said company (which is the defendant in this action) subsequently acquired, by purchase or otherwise, and has ever since owned and exer-

cised all the franchises of said Mil. & Miss. R. R. Co., and that it has been and is the same corporation, and liable to pay all demands existing against said last named company. Judgment is therefore demanded against the defendant for said sum of $810, with interest, &c.

The answer denied, among other things, the liability of the defendant to pay demands against the Milwaukee & Mississippi Railroad company, and denied any liability to pay the plaintiff's demand.

On the trial, the plaintiff, against the objections of the defendant, introduced evidence tending to show the liability of the Milwaukee & Mississippi Railroad Company to him as averred in the complaint: and also the value of the stock therein mentioned. The defendant moved for a nonsuit, on the ground that no cause of action against it had been shown. Motion denied. Defendant then introduced evidence, showing, among other things, that it was organized and incorporated in accordance with the statute, by persons who had purchased the road, franchises, and other property of the said Milwaukee & Mississippi Railroad Company at mortgage sales thereof, under decrees in the United States court for the district of Wisconsin. The court instructed the jury that if the plaintiff had proved the allegations of his complaint, he was entitled to recover the value of the stock therein mentioned. Verdict for the plaintiff; motion for a new trial denied; and judgment upon the verdict; from which the defendant appealed.

Finches, Lynde & Miller, for appellant.

Wakeleys & Vilas, for respondent.

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Sec. 1, chap. 121, Laws of 1856, after providing for the sale of railroads under mortgages, says: "Thereupon the party or parties acquiring title under any such sale, and their associates, successors, and assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, *all and the same* rights, privileges, grants, franchises, immunities, and advantages . . . which belonged to and were enjoyed by the company making such deed or mortgage, &c., and may conduct their business generally *under* and in the manner provided in *the charter of such railroad company*," &c. Sec. 1, chap. 308, Laws of 1860, providing especially for the organization of the defendant, says: "And the said corporation shall possess all the privileges, powers, authorities, and capacities acquired by the said purchaser or purchasers, *or possessed* by the Milwaukee & Mississippi Railroad Company, *by virtue of the charter of said company*, and of any law of this state." Is it not plain that by these provisions everything which was granted and conferred by the original charter is transferred to the present company? If it be possible for the legislature to transfer the corporate powers as a whole — the corporation itself — from the original corporators to the present, in what more definite and appropriate language could it have been done? They do not grant to such persons as shall purchase, &c., new and original corporate powers *such as* or *similar to* those conferred on the Milwaukee & Mississippi

Railroad Company, but "*all and the same* rights," &c. The corporation "may conduct their business . . . *under* . . . *the charter*" of the old company; and, by the act of 1860, the defendant is to "possess all the privileges, &c., *possessed by* the Milwaukee & Mississippi Railroad Company . . . *by virtue of*" its charter. Under these provisions is not the Milwaukee & Prairie du Chien Railway Company existing, operating, and doing business *under* and by *virtue* of the original charter (and amendments) of the Milwaukee & Mississippi Railroad Co.? Has it any other charter?

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So far as liability for old debts is concerned, it is wholly immaterial whether the corporate existence passes into the hands of new corporators by purchase, by mortgage liens, or by transfer without consideration. The purchaser from the corporation may take and hold its property as a purchaser merely. If he stops there, he incurs no liability. If he takes only such things — such franchises as the corporation may sell and still remain a corporation — he is a mere purchaser. But if he chooses to take a transfer to himself of all the corporate rights — of the corporate existence — he is in the same position as if he were not a purchaser and had taken such a transfer.

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PAINE, J. It seems to us almost too plain for argument that this action cannot be sustained. The plaintiff was a creditor of the Milwaukee & Mississippi Railroad Company. The road and property of that company were sold on a mortgage, and the purchasers organized the company which is the defendant in this suit, in pursuance of the provisions of chapter 121, Laws of 1856. The question is, whether this company, organized under that law by the purchasers at the mortgage sale, is liable for all the debts of the old company whose property they purchased?

The counsel for the respondent concedes that it would be absurd to claim that a purchaser of property sold on a mortgage became liable to pay the general debts of the original owner. But he seizes upon the provisions of the law of 1856, giving to the new company all the rights and powers of the old, as a foundation upon which to base the claim that the whole effect of such a proceeding is merely to work a change in the name of the old corporation, and then to apply the familiar principle that a corporation remains liable for its debts through all its changes. The fallacy of this argument consists in the assumption that because the new corporation is clothed with the same powers as the old, therefore it is the same corporation. Such a conclusion could only be arrived at by resolutely shutting the eyes to the entire scope and object of a railroad mortgage and a sale and purchase under it in pursuance of the law of 1856.

The object of that law was to enable railroad companies to borrow money, and to mortgage their property and franchises as security. To give full and perfect effect to such mortgages as securities was the

leading idea of the law. To accomplish it, the company was authorized to mortgage its franchises, and, for the purpose of removing all doubt, it was further expressly provided that the purchasers at a mortgage sale might organize anew, and be invested with all the rights and powers of the old company in the management of the road and business. Without some such provision, a purchase of the property would be unavailing. The "same" powers are conferred, not with a view to a continuation of the same corporation, but to give full effect and protection to rights created by the mortgage, adverse to those of the old corporation. To say, therefore, that because the purchasers have the same powers they are in effect the same corporation, would be to defeat the primary object of the law, and to destroy the interests of the mortgagee. His interests, and all the proceedings to protect those interests, are adverse to the original corporation. And it is this adverse character which excludes the idea that the proceeding has no other effect than merely to continue the old corporation, and which so plainly distinguishes the case from those mere changes of corporate names or powers where the principle relied on by the plaintiff has been held applicable, that it is difficult to imagine that they could ever have been confounded.

The law shows plainly that it was intended that such mortgages should have effect, like other mortgages, according to their priority, and it certainly would have been idle to expect to obtain loans upon such securities if it had been otherwise. Yet the doctrine here contended for would destroy all priority, and the purchaser under the prior mortgage would take the property and franchises of the company, with a liability to pay not only the subsequent mortgages but all its unsecured debts.

The judgment is reversed, with costs, and the cause remanded for a new trial.

FOSDICK *v.* SCHALL.

1878. 99 *United States*, 235.[1]

SCHALL leased cars to the Chicago, Danville and Vincennes Railroad. Subsequently Fosdick and Fish, as trustees of a mortgage of the railroad to secure bonds, filed a bill for foreclosure of the mortgage. A receiver was appointed and the road operated for some time. During this time Schall was paid an agreed rental by the receiver under direction of the court. The railroad was subsequently sold under decree of court and the cars returned to Schall. He then filed a petition praying that he be paid rental for a period prior to the appointment of the receiver, during which he had not been paid any rental. The Circuit Court for the Northern District of Illinois allowed this claim, directing the payment of $14,568.75 to Schall. It did not appear from the record that there were any funds in court to the credit of the cause except such as arose from the sale of the mortgaged property. Fosdick and Fish and certain bondholders appealed from this order.

Mr. Henry Crawford and *Mr. Ashbel Green*, for the appellant.

Mr. R. Biddle Roberts, contra.

MR. CHIEF JUSTICE WAITE.

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We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court in the exercise of a sound judicial discretion may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgagees and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embar-

[1] Statement abridged. Arguments and portion of opinion omitted.

rassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Gilman et al.* v. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *American Bridge Co.* v. *Heidelbach*, 94 id. 798.

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the Chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of

funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States; and it is not contended that the intervener has brought himself within the

rule fixed by the state court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the state court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.[1]

[1] The case of *Fosdick* v. *Schall* was the first case clearly to announce that not only might expenses of a receivership be paid out of the proceeds of mortgaged property in the hands of the receiver, in preference to the claims of the mortgagee, but that unsecured creditors whose claims arose prior to the receivership might also under some circumstances be likewise preferred. The doctrine has been frequently followed in railroad receiverships, and creditors for labor or supplies furnished within ninety days or six months before the appointment of a receiver have frequently if not generally been allowed a preferred claim. See *Huidekoper* v. *Locomotive Works*, 99 U. S. 258; *Hale* v. *Frost*, 99 U. S. 389; *Miltenberger* v. *Railway Co.*, 106 U. S. 286; *Trust Co.* v. *Souther*, 107 U. S. 591; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Railway Co.*, 117 U. S. 434; *Union Trust Co.* v. *Manning*, 125 U. S. 591; *St. Louis, &c., Railroad* v. *Cleveland, &c., Railway*, 125 U. S. 658; *Kneeland* v. *American L. & T. Co.*, 136 U. S. 89; *Railroad Co.* v. *Wilson*, 138 U. S. 501; *Thomas* v. *Western Car Co.*, 149 U. S. 95; *Virginia, &c., Coal Co.* v. *Central Railroad Co.*, 170 U. S. 355; *Southern Railway Co.* v. *Carnegie Steel Co.*, 176 U. S. 257; *International Trust Co.* v. *T. B. Townsend Co.*, 95 Fed. Rep. 850 (C. C. A.); *First Nat. Bank* v. *Ewing*, 103 Fed. Rep. 168. — Ed.

SIMONTON, J., IN BALTIMORE BUILDING & LOAN ASSOCIATION *v.* ALDERSON.

1898. 90 *Federal Reporter*, 142 (*C. C. A.*).

THE question then arises as to the priority in lien of the receiver's certificates over all the other liens. The Loch Lynn Heights Hotel Company is a private corporation, in no wise of a public or *quasi* public character, — a purely private concern. The bill is filed by a stockholder, who is also a simple-contract creditor. Because of the peculiar nature of the duties of a railroad corporation, — especially of the interest which the public has in keeping it a going concern, — receiver's certificates are sanctioned in railroad receiverships. The power of the court to issue them has been established beyond question. *Wallace* v. *Loomis*, 97 U. S. 162; *Fosdick* v. *Schall*, 99 U. S. 254; *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 7 C. C. A. 3, 58 Fed. 6. But the principles upon which this doctrine rests have no application whatever to private enterprises which owe no duty to the public. In the case of private corporations the court cannot authorize the issue of receiver's certificates for the purpose of improving, adding to, or carrying on the business of the company, without first having the consent of the creditors whose liens would be affected thereby. *Farmers' Loan & Trust Co.* v. *Grape Creek Coal Co.*, 50 Fed. 481. In *Raht* v. *Attrill*, 106 N. Y. 423, 13 N. E. 282, the precise question which is now under discussion came up and was decided. An hotel company mortgaged its property to raise funds to build an hotel. Before completion, the corporation became insolvent, and upon the application of its principal stockholders a receiver was appointed; and upon an application and showing that the wages of the men who worked on the hotel building were unpaid, and they threatened, unless paid, to burn the building, the court made an order authorizing the receiver to issue certificates, which were declared to be a lien prior to the first mortgage, to raise funds to pay the wages of the laborers. After an exhaustive discussion, the court held that these certificates, issued without the consent of the prior lienholders, did not displace their lien. The same question came before the Circuit Court of Appeals of the Eighth Circuit in *Hanna* v. *Trust Co.*, 36 U. S. App. 62, 16 C. C. A. 586, and 70 Fed. 2, and the same conclusion was emphasized and enforced. See, also, *Hooper* v. *Trust Co.*, 81 Md. 559, 32 Atl. 505. From this point of view, the mortgage held by the Baltimore Building & Loan Association, and the lien of the holders of the mechanics' liens, are not subject to the prior lien of the receiver's certificates.[1]

[1] *Hooper* v. *Central Trust Co.*, 81 Md. 559, 591, *accord*. See also *Makeel* v. *Hotchkiss*, 190 Ill. 311.

Dremen v. *Mercantile Trust Co.*, 115 Ala. 592, *contra*. — ED.

the persons threatening the wrong, a receiver may be appointed to take the company's property out of their hands. *s.* 797.

The right of a creditor to prevent waste or diversion of the assets of a corporation, and the right of a shareholder to interfere under similar circumstances, rest upon entirely different grounds. The shareholders of a corporation constitute the corporation itself; they have united under the charter for their mutual benefit, and each shareholder is in equity the owner of a share of the corporate property and rights. Hence, any violation of the charter, or any unauthorized application of the corporate funds, is a violation of the equitable rights of every dissenting shareholder, and presents a ground for equitable interference.

A creditor, however, is not a party to the charter contract, and has no right to complain, though the charter be violated or rescinded. Hence a creditor cannot interfere with the agents of a corporation; and he is not interested in the disposition made of surplus funds of the company, or in the management of its affairs, so long as the company is not insolvent, or in danger of being rendered insolvent by waste of its assets. On the other hand, the unanimous consent of the members of a corporation would not legalize any dealing with the company's assets, in violation of the equitable lien of its creditors.

In considering the right of a creditor of a corporation to restrain a misapplication of the company's assets, it is therefore necessary to bear in mind,

1. A creditor cannot complain of any dealing with the corporate assets unless it be in excess of the wide powers of management retained by the corporation.

2. The ordinary remedy of a creditor is by obtaining judgment and execution against the corporation, and, if necessary, by creditors' bill.

3. A creditor who has not established his claim by a judgment against the company cannot enjoin any dealing with the company's assets, or obtain the appointment of a receiver, unless it be clear, not only that the threatened dealing would impair his equitable rights, but also that he would suffer irreparable injury if left to pursue his ordinary remedy. Interference with the management of a corporation whose business is in operation can be justified only in a strong case. *s.* 799.

DEADERICK *v.* BANK.

1897. 100 *Tennessee*, 457.[1]

APPEAL from Chancery Court of Davidson County.

The defendant bank, an ordinary banking corporation, organized in 1887, in Nashville, in this State, having become insolvent, suspended business, and made an assignment for the benefit of its creditors, in March, 1893. The complainants, who were among its depositors at the time of the suspension, filed this bill to hold some of its directors liable for their lost deposits. The Chancellor rendered a decree against the directors for $25,725.34, from which two of them, to wit, Yarbrough and Hill, appealed. Upon hearing the cause, the Court of Chancery Appeals reversed this decree, and discharged the appellants

[1] Statement abridged. Portions of opinion omitted. — ED.

from all liability. The complainants now assign error on this last decree.

This is a general creditors' bill, brought by complainants after a demand upon, and a refusal of, the assignee to institute suit. In it are many charges of fraud, gross neglect, and wilful mismanagement upon the part of the directors, particularly in permitting and sanctioning certain loans to insolvent parties without proper security, whereby the bank was wrecked, by reason of which, it is alleged, they had "rendered themselves individually liable to complainants," "and such other creditors as saw proper to come in" and avail themselves of these proceedings.

The evidence failed to show that the appellants were guilty of any fraud or wilful mismanagement of the affairs of the bank. There was much evidence that the loans upon which the Chancellor based his decree were imprudent, and were made without that care and prudence which is ordinarily supposed to govern the action of the prudent business man.

Firman Smith and *Douglas Wikle*, for Deaderick.

Vertrees & Vertrees, *Edward H. East*, and *Geo. T. Hughes*, for Bank.

BEARD, J. [After stating the case.] Upon this finding by the Court of Chancery Appeals, it is clear that in so far as complainants rest their right to recover upon the statutory liability of these directors to them, as creditors of this bank, their bill must fail. The statute on this subject is as follows: "If any director or directors of any of the banks of this State shall be guilty of any fraud or wilful mismanagement of the affairs of such bank, by which any loss shall be occasioned to its creditors, such director or directors, upon legal ascertainment of the fact, shall be individually liable for such loss, and all the stockholders assenting thereto shall be liable in like manner." Code (Shannon's), § 3242.

But it is insisted that this statute does not control this case, and that the liability of the defendant directors rests upon a principle independent of it. The position assumed by the complainant is, that the directors of a bank are liable to the corporation for losses resulting to it from their mere negligence in the performance of duties attached to their office; that upon insolvency, the right of action which has thus accrued to the bank passes as an asset to an assignee, under a general assignment for the benefit of its creditors; that if such assignee, on demand, fails or declines to bring suit to enforce this liability, then these creditors may file a bill in equity, for the use of the bank, making proper averments and parties, and recover against the delinquent directors. Is this position sound in reason or upon authority?

It is to be noted that we are not now dealing with a case where the assets of a suspended insolvent corporation have been lost to creditors by the negligence of the parties in control, nor with a case where directors have unlawfully or fraudulently appropriated to their own

use, or otherwise wrongfully diverted, the assets of the bank, but rather with one, where the only ground for recovery is that the defendant directors, in a going corporation, at a time when the record fails to show evidences of insolvency, by their failure to exercise that degree of caution in supervising the business of the bank, that is "ordinarily supposed to govern the action of the prudent business man," have made it possible for a loss to occur to the corporation through the mismanagement of an officer or officers in direct control of its daily transactions.

It is certainly true, as a general proposition, that "the agent's primary duty is to his principal. To him alone does he stand in the relation of privity and confidence. To him alone does he owe the performance of those duties which are implied from that relation, or which he has expressly assumed, and to him alone is the agent responsible for a failure to perform them. It is, therefore, the general rule that no action can be maintained by third persons against the agent to recover damages for any injury which they may have sustained by reason of the nonperformance or neglect of duty which the agent owes to his principal." Mechem on Agency, Sec. 539. This rule would certainly obtain if the complainants were creditors of an individual insolvent debtor, and were seeking a recovery against the defendants, as agents of this debtor, for some loss resulting to their principal from their lack of ordinary prudence in the matter of their agency. Such a claim would be repelled promptly, because of the want of the privity relation. Upon what higher or better ground do complainants stand in the present suit?

A corporation "is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true, but in law it is as distinct a being as an individual is, and is entitled to hold property . . . as absolutely as an individual can hold it." *Graham* v. *Railroad Co.*, 102 U. S. 148; *Deadrick* v. *Wilson*, 8 Bax. 114; *Parker* v. *Bethel Hotel Co.*, 12 Pickle, 278. And its directors are agents, in the eye of the law, not of the stockholders, but of this legal entity — the corporation. 3 Thomp. Corp., Sec. 4090. The doctrine that they are trustees has been distinctly repudiated in this State in *Wallace* v. *Lincoln Bank*, 5 Pickle, 649. In that case this Court said: "Directors are not express trustees; . . . they are mandatories; they are agents; they are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith; they do not hold the legal title, and more often than otherwise are not the officers of the corporation having possession of the corporate property."

That directors are liable in an action at law to their principal, the corporation, for losses resulting to it from their malfeasance, misfeasance, or their failure or neglect to discharge the duties imposed by their office, and in equity, to the stockholders, for these losses, the corporation declining to bring suit, is clear, upon the authorities. Though the corporation is the legal entity, yet the stockholders are

interested in the operations of the corporation while in a state of activity, and, upon its dissolution, in the distribution of its property, after all debts are paid; and so its officers or agents stand in a fiduciary relation to both.

But it is otherwise as to creditors. The directors of a going corporation, whether able to pay its debts or not, owe no allegiance to them. It is true that the creditors may extend credit upon the faith that the company has assets to pay its debts, and that these assets are prudently managed, yet they are strangers to the directors; they maintain no fiduciary relation with them; there is a lack of privity between the two. As was said by the Supreme Court of the United States, in *Briggs* v. *Spaulding*, 141 U. S. 132, the relation between the creditors and the corporation "is that of contract and not of trust;" but there is nothing, of either contract or trust, in all ordinary cases, to create any relation between the creditor and the directors. A creditor of a going corporation, being thus a mere stranger, we think it clear that he can no more, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention, than could the creditor of any other insolvent debtor maintain a suit against his agent, under similar circumstances.

In such a case as the one we are dealing with, — that is, loss to the corporation resulting from mere negligence on the part of its directors, — a creditor seeking to hold the directors liable for this loss, even in a suit like this, must rest his claim upon some provision of positive law. Mr. Thompson, in the fourth volume, Sec. 4137, of his work on Corporations, says: "We find that it has been held that the fact that directors and officers of a corporation have mismanaged its business does not render them liable to creditors, unless they are made liable by the provisions of the articles of incorporation or by statute." Again, in Sec. 4138, he says: "Neither, in the absence of a special statute, are the directors of a bank liable to a general depositor for mismanaging the affairs of the bank, so that his debt is lost; for, unless they are made liable by statute, the breach of duty of which they have been guilty is to the bank, and not to the customers."

The author here is speaking of mismanagement in the sense of nonfeasance as contradistinguished from malfeasance, and, thus restricting it, we think the text announces a sound view of the law. A late case, and one in which this view is enforced with great vigor of reasoning, and after a careful examination and comparison of the authorities, is that of *Landis* v. *Sea Isle C. H. Co.*, N. J. Eq. (1 Am. & Eng. Corp. Cas. Anno. 208). That was a bill in equity filed by a complainant who was both a stockholder and a creditor of an insolvent corporation, to hold its directors liable for losses sustained by their mismanagement. In the learned opinion of the Vice-Chancellor, the distinction is clearly taken between their liability to complainant in the one character and in the other. To him as a stockholder they

were held to be answerable for losses resulting from their negligence because of the fiduciary relations existing between the two; but to him as a mere creditor, they were held not liable for such negligence, because there was no element of trust in the claim, and no evidence of a diversion by them of corporate funds for corporate purposes.

[Remainder of opinion omitted.]

Decree of the Court of Chancery Appeals affirmed.[1]

MARSHALL, J., IN KILLEN *v.* BARNES.

1900. 106 *Wisconsin*, 546, *pp.* 563, 564.

MARSHALL, J. . . . There are numerous cases where the distinction has not been clearly recognized, if at all, between a wrong to a depositor of a bank committed by its officers, for which they are personally liable directly to such depositor on the ground of deceit, and a wrong by such officers to the corporation for which they are liable to such corporation and through it to the creditors. *Delano* v. *Case*, 121 Ill. 247, is a good specimen of such cases. It would take too much space to review such cases and to try to bring harmony out of the confusion that would be disclosed, though we venture to say that in most instances that proceed on the ground of negligence the purpose will be found to have been to enforce a liability in the right of the corporation. Such is *Hodges* v. *New England S. Co.*, 1 R. I. 312, often found cited in the books. The confusion on this subject is quite well illustrated by the fact that the *Hodges Case*, a plain action to enforce the right of the corporation because its proper officers failed to do their duty in that regard, is cited in *United Society of Shakers* v. *Underwood*, 9 Bush, 609, and other authorities upon which the *Delano Case* is grounded, to support the decisions there made that officers of a bank may be held liable directly to depositors for losses of the bank to the damage of depositors, on the ground of negligence and fraud in performance of their duties to the corporation. Other cases to support the direct action of a creditor against an officer for damages to the former, because of the fraud or negligence or other actionable wrong of the latter, are based on statutes, as, for instance, *Stephens* v. *Overstolz*, 43 Fed. Rep. 465.

The real principle upon which the cases are probably grounded, which hold that the creditors may sue directors to enforce a personal

[1] "There is no relation between the creditors and directors of a corporation of which a court of law can take cognizance, nor have creditors any *legal* claim upon the corporate assets. It is evident, therefore, that a creditor cannot sue the directors at law for damages on account of an unauthorized diversion or waste of the assets by which he has been deprived of his rights. The right of the creditor to have the assets restored, or compensation made for the loss, is a purely equitable claim." 2 Morawetz on Corporations, 2d ed. s. 796. As to suit at law by shareholder against directors, see *Smith* v. *Hurd*, *ante*, 494. — ED.

right against them, is that they are *quasi* trustees for such creditors under the trust-fund doctrine, so called, which, as will be hereafter shown, has no place in our system. The directors of a corporation are trustees for it and bear no other relation to its creditors than the agent of an individual to his creditors.

SECTION IV.

Reserved Power of Legislature to alter or amend Charter.

TOMLINSON *v.* JESSUP.

1872. 15 *Wallace* (*U. S.*), 454.[1]

APPEAL from the U. S. Circuit Court for the District of South Carolina.

Bill in equity by stockholder in Northeastern Railroad Company, to enjoin state officials from levying a tax on the property of the road. The N. E. R. Co. was incorporated in 1851 by the legislature of South Carolina. At that time the 41st section of the act of 1841 was in force, as follows:

"It shall become part of the charter of every corporation, which shall, at the present, or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal, by the legislative authority." [2]

The act of incorporation did not except the charter of the company from the operation of this section.

By an amendment of the charter passed in 1855, it was enacted as follows:

"That the stock of the said company, and the real estate that it now owns or may hereafter acquire, which is connected with or subservient to the works authorized in the charter of the said company, shall be, and the same is hereby exempted from all taxation during the continuance of the present charter of the said company." [3]

The constitution of South Carolina, adopted in 1868, provided that the property of corporations then existing, or thereafter created, should be subject to taxation. Statutes were subsequently passed providing for taxing property of railroad companies, under which state officials were proceeding to tax the property of the Northeastern R. R. Co.

The court below granted a final injunction. The defendants appealed

D. T. Corbin, and *D. H. Chamberlain*, for appellants.

T. G. Barker, *contra*.

[1] Statement abridged. — ED.

[2] Stat. at Large, vol. 11, p. 168.

[3] Ib., vol. 12, p. 407.

FIELD, J.

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The provisions of that law [the act of 1841], therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.

The act amending the charter of the Northeastern Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation.

There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. It was so adjudged at an early day in *New Jersey* v. *Wilson*;[1] the adjudication was affirmed in *Jefferson Bank* v. *Skelly*;[2] and has been repeated in several cases within the past few years, and notably

[1] 7 Cranch, 164. [2] 1 Black, 436.

so in the cases of *The Home of the Friendless* v. *Rouse*[1] and *Wilmington Railroad* v. *Reed*.[2] In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.

DECREE REVERSED, and the cause remanded with directions to *Dismiss the suit.*

BUFFALO & N. Y. CITY R. R. CO. *v.* DUDLEY.

1856. 14 *New York* (4 *Kernan*), 336.[3]

ACTION to recover the amount subscribed by the defendant to the capital stock of the Attica and Hornellsville Railroad Company. The corporation was chartered in 1845, with a capital of $750,000. In 1847, defendant subscribed for twenty shares. At the time of the subscription the act of incorporation authorized the construction of a

[1] 8 Wallace, 430. [2] 13 Id. 264.

[3] Statement abridged. Only so much of the case is given as relates to a single point. — ED.

railroad from Hornellsville to Attica, a distance of sixty miles. The right to alter or repeal was reserved to the legislature in the act of incorporation. On the 31st of March, 1851, an act was passed by the legislature to amend the charter of said company so as to authorize said company to extend the road to the city of Buffalo, to change the corporate name, and to increase its capital stock to $1,500,000. On the 16th of April, 1851, the directors of the company met in pursuance of the last named act and accepted it; changed the name of the corporation to the present name; extended the road to Buffalo, a distance of thirty-one miles beyond Attica, and increased the capital stock to the prescribed amount.

The defendant's answer set up as a defence to the action, that the plaintiff's charter had been altered and its road extended after his subscription and without his consent, and alleged that such alteration and extension were prejudicial to his interest as a stockholder.

At the trial defendant moved for a nonsuit on the following grounds (among others): Fifth, that defendant never subscribed to any stock in a road from Hornellsville to Buffalo. Sixth, that by the alteration of the charter in a fundamental part and extending the road, the defendant was absolved from his obligation to pay his subscription. The motion for a nonsuit was overruled, and defendant excepted.

The defendant then offered to prove the cost of the extension from Attica to Buffalo; that it was injurious to his interests, and was made without his consent or concurrence; but the evidence was excluded, subject to defendant's exception.

The court, against defendant's objection, ruled that there was nothing to go to the jury, and directed a verdict for plaintiff. A judgment entered upon this verdict was affirmed at the General Term of the Supreme Court. Defendant appealed.

John Ganson, for appellant.

H. W. Rogers, for respondent.

T. A. JOHNSON, J.

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The subscription having been valid, so as to give a right of action, in case of non-payment, to the corporation, did the alteration of the charter and the extension of the road subsequently absolve the defendant from his liability upon such subscription? This question is, I think, entirely settled by the decision of this court in the case of *Schenectady and Saratoga Plank Road Company* v. *Thatcher* (1 *Kern.*, 102). The right to alter was reserved in the charter, and the subscription must be taken to have been made subject to having such additional powers conferred as the legislature might deem essential and expedient. The change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation remaining still the same. It may be admitted that, under this reserved power to alter and repeal, the legislature would have no right to change the fundamental

character of the corporation and convert it into a different legal being, for instance, a banking corporation, without absolving those who did not choose to be bound. But this they have not attempted to do. The additional powers are of the same character, and have been regularly acquired from the legitimate source of power, and if they have been fairly exercised, the defendant, although the change may have operated to his pecuniary disadvantage, is still bound by his undertaking. It is no breach of the agreement between the plaintiff and the defendant. It might, perhaps, be inferred from some expressions in the opinion of Parker, J., in the *Schenectady and Saratoga Plank Road Company* v. *Thatcher* (*supra*), that that case turned in some measure upon the fact that there was no suggestion or proof of injury to the defendant's interests resulting from the change complained of. It is obvious, however, that the decision was not based upon any such consideration. It is manifestly a question of power; and if the power was legitimately acquired, and has been exercised without fraud, the rights of the parties are in no respect changed as between themselves, whether the alteration is beneficial or injurious to the defendant's interest. Whether he has made or lost by the change, in no respect affects the question of authority in the plaintiff.

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SELDEN, J.

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The point made by the defendant upon the alteration of the plaintiff's charter, changing the name of the corporation and authorizing the extension of its road from Attica to Buffalo, must, I think, be considered as sufficiently answered by the decision of this court in the case of *The Schenectady and Saratoga Plank Road Company* v. *Thatcher* (1 *Kern.*, 102). The power reserved to the legislature in the original act of incorporation, to alter or repeal the act, is as broad in this case as in that. It is, indeed, entirely unlimited. Under the rule established in that case, no mere addition to or alteration of the charter, however great, would operate to discharge a stockholder from his obligation to the corporation. To work such a discharge the charter must be repealed, or the legislation must be such as virtually to subvert the corporation itself; or, at least, to destroy its identity. A mere change of name has been repeatedly held not to have that effect. (*Mayor of Scarborough* v. *Butler*, 3 *Lev.*, 238; *Mayor of Colchester* v. *Seaber*, 3 *Burr.*, 1866; *Mellor* v. *Spateman*, 1 *Saund.*, 344, *note* 1; *Overseers, &c., of North Whitehall* v. *South Whitehall*, 3 *Serg. & Rawle*, 117.) In other respects the change in this case is not materially greater than in that of *The Schenectady and Saratoga Plank Road Company* v. *Thatcher* (*supra*). It does not become necessary, therefore, to take into consideration the soundness of the principles advanced in the case of *The Hartford and New Haven Railroad Company* v. *Croswell* (5 *Hill*, 383). That case is in direct conflict with several English cases, as well as with some decided in this country;

ZABRISKIE *v.* HACKENSACK AND N. Y. R. CO.

1867. 18 *New Jersey Equity* (3 *C. E. Green*), 178.[1]

THIS case was argued upon a rule to show cause why the defendants should not be enjoined from mortgaging the property of the company, or from expending its funds in the construction of a road not authorized by their charter, but being an extension of the original road, authorized by a supplement to their charter.

C. H. Voorhis, for complainant.

Knapp, and *Hopper*, for defendants.

ZABRISKIE, CHANCELLOR. The Hackensack and New York Railroad Company was incorporated in 1856, with power to construct a railroad from Hackensack to the Paterson and Hudson River Railroad, with a capital stock of two hundred thousand dollars, and with power to mortgage its road and lands, franchises and appurtenances, to the amount of fifty thousand dollars. Under this act, it laid out, located, and built a road five miles in length, terminating at Essex street, in Hackensack, within one mile of the court-house, as required by the charter. It borrowed thirty thousand dollars, for which it gave a mortgage upon the road and its equipment, franchises, and other property. By a supplement to this charter, passed March 12th, 1861, it was authorized to extend the road northwardly to Nanent, on the Erie railway, in the state of New York, a distance of about twelve miles, to increase the capital stock to any extent required, and to issue bonds to the amount of two hundred and fifty thousand dollars, which, in the words of the act, were "for the construction and equipment of the road to be constructed under this act, and to secure the payment of said bonds, the said company shall have power to mortgage the said road, with its franchises and chartered rights."

In 1861, the company extended its road under this supplement to a point on Passaic street, in the village of Hackensack, more than a mile from the court-house, the length of the extension being about a mile. After this, it executed a new mortgage upon the whole road, as extended, and its equipments, and its franchises and chartered rights, to secure the payment of ten thousand dollars. No new stock was issued for this extension.

The company has recently, under the supplement of 1861, laid out and located another extension for about a mile and a half north of the present terminus, reaching from Hackensack to New Bridge, and has made contracts for the construction of it, and has, by resolution, determined to make a new mortgage to cover the whole road, as it will be when finished to New Bridge, with its equipments and appurten-

[1] Argument and part of opinion omitted. — ED.

ances, and the chartered rights and franchises of the company, to secure one hundred bonds of one thousand dollars each, for the purpose of paying off the two mortgages which are now on the road; for relaying with new rails and ties the road first built, and furnishing it with the necessary equipment, which is now deficient for its business; and for constructing and equipping the extension to New Bridge.

The complainant is a stockholder in the company; and of nine hundred and thirty shares of capital stock issued, for one hundred dollars each, he owns three hundred and twenty-four. He applies for an injunction to restrain the defendants from constructing the extension to New Bridge, and from executing the mortgage proposed.

He opposes the extension, on the ground that it is a different enterprise from that for which his stock was taken, and the money paid, and that neither the directors, nor a majority of the stockholders, can compel him to embark his capital in any undertaking but the one for which it was subscribed and paid.

[The learned Judge *held*, that the extension to Nanent, authorized by the act of 1861, had not been assented to by a majority of the stockholders.]

The extension authorized by the act of 1861, is a radical change in the object of this corporation; it is an enterprise entirely different from that in the charter. That was to construct and operate a railroad from Hackensack to the Paterson railroad, at Boiling Spring, an easy and almost direct route to New York; it was from a thriving village, the county town of Bergen county, over a level country, and only five miles in length, as shown by the return of its location. The extension would be about twelve miles in length, through an uneven country, mostly, if not wholly, agricultural; with no village, except the very small one at New Bridge, on its route; and it runs into the state of New York some distance, and terminates at a point on that part of the Erie railway which the company have abandoned for regular traffic, and on which few trains are run. It is an entirely different enterprise.

The question here is, can this company, either with or without the consent of a majority in interest, of its stockholders, compel the complainant to embark capital subscribed for the first enterprise, in this new one, entirely different.

Since the Dartmouth College case, in the Supreme Court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the state courts, that a charter, granted by the legislature to a corporation, is a contract between the state and the corporators, and that the state can pass no act to take away or impair any of the franchises or privileges granted by it. The company, or artificial person thus created, and its property, is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons and their property are; provided they are not such as to take away or impair any of the franchises plainly granted by the charter. This doc-

trine did not prevent the legislature from conferring new privileges upon any corporation, to be accepted at its own election.

It is also settled, upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incorporated into the constitution of the United States, and of almost every state in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed.

[After referring to *Natusch* v. *Irving*, to *Kean* v. *Johnson*, 1 Stockton, N. J. 401, and other cases, the opinion proceeds:]

After the effect of the rule established in the Dartmouth College case began to be felt in the states, it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted, and that provisions incautiously inserted, too much restricted the power of future legislatures; and that the laws, which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the legislature of many states, by degrees and successively, adopted the practice of inserting in acts granting franchises, that they might alter, modify, or repeal the act; and also, by general law, provided that all acts of incorporation thereafter passed, should be subject to such alteration and repeal.

The provision is contained in the general act of this state, passed in 1846, (*Nix. Dig.* 152, § 6,)[1] that such charters should be subject to alteration, suspension, and repeal, in the discretion of the legislature. This and all similar special and general provisions were intended for the purpose specified; to give to the legislature the clear right, at their pleasure, to alter or repeal the acts of incorporation. The state, without this, could have done it with the assent of the corporators. They could give them property; they could add to their powers or privileges. But they could not take away any power, privilege, or franchise, conferred by the act, nor compel them to exercise any new power or franchise conferred.

[1] *Rev. p.* 178, § 6.

ERIE AND NORTH-EAST R. CO. *v.* CASEY.

1856. 26 *Pa. State*, 287.[1]

BILL in equity, filed by the Erie and North-East R. Co. to restrain the defendant from taking possession of the railroad of plaintiff company.

The charter of the R. R. Co., granted in 1842, contained a provision, that "if the said company misuse, or abuse any of the privileges hereby granted, the legislature may resume the rights and privileges hereby granted to the said company."

In 1855, the legislature passed an act, repealing and annulling the charter of the company, and authorizing the Governor to appoint one or more persons to take and have the charge and custody of the said railroad. The defendant Casey was appointed by the Governor under this act, and was about to take possession of the road.

The plaintiffs thereupon filed the present bill; which prayed for a special injunction and for further relief.

On Jan. 9, 1856, the rule for a special injunction was heard on the bill, and special affidavits and exhibits, before the court in banc.

St. G. T. Campbell and *Meredith* (*Stanton* and *Hurst* with them), for plaintiffs.

Casey and *Thompson*, for respondent.

BLACK, J. [After overruling other objections to the validity of the repealing act.]

The authority given by the Act of October, 1855, to the defendant to take possession of the railroad is asserted by the plaintiff's counsel to be an act of confiscation — a taking of private property for public use without compensation. If this be true, the injunction ought to be awarded; for no legislature can do such a thing under our constitution. When a corporation is dissolved by a repeal of its charter, the legislature may appoint, or authorize the governor to appoint a person to take charge of its assets for the use of the creditors and stockholders; and this is not confiscation, any more than it is confiscation to appoint an administrator to a dead man, or a committee for a lunatic. But money, or goods, or lands, which are or were the private property of a defunct corporation, cannot be arbitrarily seized for the use of the state without compensation paid or provided for. This act, however, takes nothing but the road. Is that private property? Certainly not! It is a public highway, solemnly devoted by law to the public use. When the lands were taken to build it on they were taken for public use; otherwise they could not have been taken at all. It is true the plaintiffs had a right to take tolls from all who travelled or carried freight on it, according to certain rates fixed in the charter, but that was a mere franchise; a privilege derived entirely from the charter,

[1] Statement abridged. Arguments and portions of opinions omitted. — ED.

and it was gone when the charter was repealed. The state may grant to a corporation, or to an individual, the franchise of taking tolls on any highway, opened or to be opened, whether it be a railroad or river, canal or bridge, turnpike or common road. When the franchise ceases by its own limitation, by forfeiture or by repeal, the highway is thrown back on the hands of the state, and it becomes her duty, as the sovereign guardian of the public rights and interests, to take care of it. She may renew the franchise, give it to some other person, exercise it herself, or declare the highway open and free to all the people. If the railway itself was the private property of the stockholders, then it remains theirs and they may use it without a charter as other people use their own — run it on their own account — charge what tolls they please — close it or open it when they think proper — disregard every interest except their own. The repeal of charters on such terms would be courted by every railroad company in the state; for it would have no effect but to emancipate them from the control of law, and convert their limited privileges into a broad, unbounded license. On this principle, a corporation might be rewarded, but never punished, for misconduct. Repeal of its charter, instead of bringing it to a shameful end, would put "length of days in its right hand, and in its left hand riches and honour." But it is not so. Railroads made by the authority of the Commonwealth upon land taken under her right of eminent domain, and established by her laws as thoroughfares for the commerce that passes through her borders, are her highways. No corporation has any property in them, though corporations may have franchises annexed to and exercisable within them.

Such a franchise the plaintiffs had, but they have it no longer. The right to take tolls on a road is an incorporeal hereditament, which may be granted to a corporation or to an individual, and the grantee has an estate in the franchise. But what estate? The estate endures for ever if the charter be perpetual; for years, if it be given for a limited period; and at will, if it be repealable at the pleasure of the legislature. This corporation, after its privileges were abused, had an estate at will, and the Commonwealth chose to demand repossession. That terminated the estate as completely as an estate for years would be terminated after the expiration of the term. The grant was exhausted, the corporation lived its time out. Its lease of life was expressly limited, at the day of its creation, to the period when the legislature should dissolve it for misconduct. When the legislative will was spoken, its hour had come. Having no right to keep the franchises any longer, it would be absurd to claim compensation for taking them away. To say that the stockholders have a right to compensation for the franchises, because they are wrongfully taken, and that they were wrongfully taken because they have a right to compensation, would be reasoning in a very vicious circle. If the stockholders had a right to retain the franchises, the charter could not be repealed at all, with or without compensation. If they had no right to retain them, they have no claim to compensation.

A brief recapitulation of the main points in the case may serve to make the grounds of our judgment somewhat plainer.

I. This charter was granted with a reservation of the right to repeal it, if the franchises should be abused or misused.

II. We are satisfied that, in point of fact, those franchises were abused and misused.

III. After that event happened, the General Assembly was invested with full power to repeal the charter, and the corporators held their franchises from the state merely as tenants at will, in the same manner as if there had been an unconditional reservation of the right to repeal.

IV. After the interest of the corporators had been thus cut down by their own misconduct to an estate at will, the legislature only could enlarge the charter, so as to make it a perpetual grant, or put the corporators on another term of probation.

V. The judicial proceedings against the corporation did not and could not disarm the legislature of its reserved right to repeal, nor enlarge the estate of the corporation in its franchises, nor change the terms of the original grant, for these are things which the judiciary cannot do, nor the executive either.

VI. The power of the legislature is not restricted by the rules of pleading and evidence which the courts have adopted; and therefore the state may act in the legislature upon a truth which she would have been estopped to show in a court if the legislature had not interfered.

VII. The power to repeal for abuse of corporate privileges is a different right from that of demanding a judicial sentence of forfeiture, and is reserved for the very reason that it may afford a remedy when a *quo warranto* would not.

VIII. The charter being constitutionally repealed, the franchises are, as a necessary consequence, resumed to the state, and the road remains what it always was — public property.

IX. The corporators cannot be entitled to compensation, for they had no property in the road, and after their default they held the corporate franchises, at the will of the legislature, and the exertion of that will, in the resumption of the franchises, did them no injury but what they agreed to submit to.

The injunction which the plaintiffs have moved for is to be refused.

LOWRIE J. and KNOX J. delivered concurring opinions.

LEWIS C. J. and WOODWARD J. delivered dissenting opinions [which are reported in 1 Grant's Pennsylvania Cases, 274–301]. From these opinions, the following extracts are made.

LEWIS C. J. But the Act of 1855 bears upon its face decisive evidence, that other objects were in contemplation than the mere nullification of the charter. It provides for taking possession of the railroad,

ATCHISON, T. & S. F. R. R. v. CAMPBELL.

1900. 61 *Kansas*, 439.[1]

ERROR from Court of Appeals.

Action by *Campbell* v. *R. R. Co.*, to recover money paid as passenger fare from Kansas City, Kansas, to Attica, Kansas. Campbell shipped a car-load of live stock from Attica to Kansas City. On the going trip he rode free on a stock-shipper's contract issued to him by the R. R. Co. at the shipping point. On the return trip he demanded to be carried free, in accordance with the following provision of Chapter 167, Laws of 1897: —

"Whenever any railroad company, or corporation, doing business within the limits of this state, shall receive and ship any live stock by the car-load, said company, in consideration of the usual price paid for the shipment of said car, shall pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare. . . ."

Campbell's demand for free carriage on the return trip was refused. To avoid ejection he paid the required fare; and then brought the present action. The Court of Appeals rendered judgment in favor of Campbell (8 Kansas Appeals, 661).

A. A. Hurd, W. Littlefield, and *O. J. Wood,* for plaintiff in error.

Sankey & Campbell, for defendant in error.

DOSTER, C. J. [After stating the case.] The sole question involved in the case is the constitutionality of the legislative enactment under which the demand for free transportation was made.

[After quoting the act.]

The above act is assailed upon the ground of its repugnancy to that portion of the fourteenth amendment to the constitution of the United States which reads: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Speaking for myself, I am of the opinion that a strained and artificial construction has been often placed upon this constitutional provision, especially by the federal courts, for the purpose of bringing within its prohibitive terms much wholesome state legislation. For instance, I do not believe that the word "person" used in the clause above quoted was designed to include corporations, nor that it can in reason bear that signification when read in connection with the preceding clauses of the section and interpreted in the historic light of the origin and purpose of the amendment. However, the federal courts, the authoritative expositors of the federal constitution, departing from the view first taken by them, have been for many years holding that a corporation was a "person" within the meaning of the provision above quoted. Those decisions are, of course, binding upon

[1] Statement abridged. — ED.

the state courts. Being, therefore, under the compulsion of the now settled rule of interpretation, I agree with my associates that the above-quoted enactment cannot be upheld. It operates as a deprivation of property without due process of law, and is a denial of the equal protection of the laws.

The property of a railroad company consists not alone in its franchise to be a corporation, nor its right of way and track, nor its rolling-stock and other tangible property, but it consists, in its most essential character and important sense, in the right to charge and collect tolls for the transportation of persons and property over its line. Without the right to take tolls such corporation could not do business, and a denial of its right to take tolls would as effectually render valueless all of its other property as a confiscation of its other property would defeat its ability to carry on its business. Upon the conception of the right to take tolls as a species of property belonging to railroad corporations rest all the decisions of all the courts, both state and federal, denying the right of state legislatures to restrict such tolls below a reasonable amount. It needs but a glance at the act in question, and but a moment's thought over the consequences to result from a sanction of its provisions, to perceive that it strikes vitally at the fundamental right of a railroad company to own and enjoy that species of property which exists in the form of its franchise to charge and collect tolls. It purports in its title to be and is "An act to require railroad companies to furnish free transportation to shippers of stock in certain cases"; and in its body it requires railroad companies, "in consideration of the usual price paid for the shipment of a car of stock, to pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare."

Upon no theory whatever, consistent with the idea that the franchise of railroad companies to take tolls is a species of property, or consistent with the adjudications of the courts that such right of property is protected by the fourteenth amendment to the federal constitution, can such an enactment be upheld. Once grant that so much of the property of railroad companies as is involved in their right to charge passenger fare to shippers of stock can be taken away by legislative enactment, and it necessarily follows that the like property of theirs which consists in their right to charge passenger fare to other shippers of other kinds of property can also be taken away for like reasons; and once grant, upon like considerations, that the property right of railroad companies to take tolls for passenger carriage can be thus taken away, and the right to take tolls for freight transportation can be likewise taken away; and once grant that the right to take tolls for freight and passenger carriage can be taken away, and it follows that the right to own and possess the rolling-stock and other like property necessary to the operation of the road can be likewise taken away; in short there would be no end to the extension of legislative authority over the right of railroad companies to own and enjoy pro-

perty. It would be no answer to say that the enforcement of the act in question would not sufficiently impair the property right of the companies to take tolls as to be substantially detrimental to their interests. Rights are not measured or ascertained by the extent of the injury resulting from their impairment or denial. They do not cease to exist merely because the hurt to them may be slight. Rights reside in principles and not in the physical ability of the claimant of rights to do without a minor portion of them.

Again, speaking for myself, I am a firm believer in the right of the legislature of this state, under the reserved power of the constitution (art. 12, § 1), to amend or add to the original acts providing for the incorporation of companies, and to amend or add to the original body of laws governing them, without declaring its enactments to be amendatory in character. However, its power of amendment in such cases is limited to such enactments as do not substantially impair the vested rights of the corporation. (7 A. & E. Encycl. of L., 2d ed., 675.) I therefore agree with my associates that the act in question, even if it be regarded as an exercise of the reserved power of the legislature to amend the charter of railroad corporations, is a substantial impairment of their vested rights.

We do not mean to say that the legislature is powerless to declare circumstances or prescribe conditions under which railroad companies may be required to furnish transportation to shippers of live stock or other merchandise over their lines. However, those circumstances or conditions, if declared or prescribed, must exist in the form of considerations or equivalents for the transportation furnished. It may be that railroad companies can be compelled to carry patrons of their lines for some other consideration than cash fares. To illustrate — but only to illustrate, not to decide — it may be that a legislative enactment which imposed upon shippers of live stock the obligation to care for their stock *en route*, and to that extent to relieve the trainmen of the burden of its care, and which required the company to transport the shipper free as an equivalent for his relief of the train employees in the way stated, would be constitutionally valid — would not be a taking of private property without compensation. But the enactment in question does not provide for the equivalent of labor performed for transportation furnished. It declares that the transportation shall be furnished "'in consideration of the usual price paid for the shipment of said car." What the railroad company is required to do is not required of it as a compensation for anything to be done for it by the shipper, but is required of it in the form of a gratuity over and above the usual and ordinary charges for transportation. The enactment is not framed upon the assumption that the usual price paid for the shipment of live stock is excessive to the extent of the passenger carriage of the shipper to and from the place of shipment, and that in order to make good the excess the shipper shall be transported free, but it is framed upon the assumption that the charge for the transportation of the car of stock is a reasonable one.

EAGLE INSURANCE CO. v. OHIO.

1894. 153 *U. S.* 446.[1]

ERROR to the Supreme Court of the State of Ohio.

The Insurance Company, plaintiff in error, was incorporated on March 22, 1850, by an act of the General Assembly of Ohio, 48 Ohio Laws, 498. Sections 3654 and 3655 of the Revised Statutes of Ohio, [enacted subsequently to the charter], require, in substance, that the officers of each insurance company, organized under any law of the State, shall annually furnish statements of the condition of the company in numerous specified particulars, concerning assets, liabilities, expenditures, dividends, policies in force, &c. The statute prescribes penalties for non-compliance.

Under these sections proper blanks were furnished to the company by the State Superintendent of Insurance, and on its refusal to make the returns required by law, proceedings by mandamus were begun against it. The defence was that the above provisions impaired the obligation of the contract which grew out of its charter. Upon the decision of the Supreme Court of the State making the writ peremptory, the case was brought here by writ of error.

Thomas H. Kelly (*John F. Follett* with him), for plaintiffs in error.

J. K. Richards, Attorney General of Ohio, filed a brief for defendant in error, but the court declined to hear him.

WHITE, J. [After stating the case.] The only question presented is whether or not the charter of the plaintiff in error exempted it from obligation to comply with the subsequently established police regulations of the State, contained in sections 3654 and 3655 of the Revised Statutes of Ohio. This subject was fully considered by this court in the case of *The Chicago Life Insurance Company* v. *Needles*, 113 U. S. 574. There the company had been chartered by the State of Illinois to carry on a life insurance business, and the question was whether subsequently enacted police regulations of that State for the inspection of such business, and for the liquidation thereof, in the event of insolvency, could be enforced against a corporation working under a prior charter without impairing the obligation of the contract. The statute considered in the *Needles case* authorized the Auditor, whenever the actual funds of any life insurance company doing business in the State were not of a net value equal to the net value of its policies, according to the "combined experience" or "actuaries'" rate of mortality, with interest at four per cent, to give notice to such company and its agent to discontinue issuing policies in the State until such time as its funds should become equal to its liabilities, valuing its policies as aforesaid. The law, in addition, required every life insurance company incorpo-

[1] Statement abridged. — ED.

rated in Illinois to transmit to the Auditor on or before the 1st day of March in each year a sworn statement of its business standing and affairs, in the form prescribed and authorized by law. It also empowered the officer to address inquiries to any company in relation to its "doings and condition," and any other matter connected with its transactions, which inquiries, it provided, should be "promptly answered;" and it imposed upon him the duty of making an examination of the condition and affairs of any company, whenever he deemed it expedient to do so, and had reason to suspect the correctness of any annual statement, or that the company was in an unsound condition. By another statute it was provided that if, upon examination of the affairs of any insurance company, the Auditor should conclude that it was insolvent, or that its further continuance in business would be hazardous to the insured or the public, he should apply by petition to the judge of any Circuit Court for an injunction restraining the company from proceeding with its business until further hearing, etc. Upon the case as thus presented, the court said:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained consistently with the power which the State has, and, upon every ground of public policy, must always have over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett* v. *Taylor*, 9 Cranch, 43, 51; Angell & Ames on Corporations, 9th ed. paragraph 774, note.

"Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 68, 70; *Commonwealth* v. *Farmers' & Mechan-*

ics' Bank, 21 Pick. 542; *Commercial Bank* v. *Mississippi*, 4 Sm. & Marsh. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

These views are decisive of the issue here. An attempt is made to distinguish that case from this upon the ground that, in the former, the proceedings were for the purpose of compelling the company to cease from business because of insolvency; while, in this case, the question is as to the obligation of the company to make the statements required by the statute. This distinction is without foundation. In the *Needles case*, the duty was expressly imposed upon the corporation to make statements identical in form and substance with those which insurance companies are required to make under the Ohio statute we are here considering. Many additional police powers were conferred by the Illinois law, among them being the authority which, as stated above, was given to the State Auditor to apply for an injunction restraining a company from continuing its business, whenever, by its statement, it appeared to him to be insolvent. It is, indeed, true that the relief there invoked was the restraint of the corporation from doing business on the ground of insolvency. But that case substantially involved not only the right to compel the statement, but the greater right to prevent, in case of insolvency, the continuance of the business of the corporation. Hence, as the greater includes the less, the *Needles case* necessarily embraces every issue presented here.

Another contention is that compliance with the provisions in regard to statements of its business would bring the company under the operation of the general law of the State relating to corporations, and thus place it in the position of voluntarily subjecting itself to many provisions which would, if applied, impair the obligations of the charter. In March, 1892, (89 Ohio Laws, 73,) the General Assembly of Ohio specifically enacted that any fire insurance company which should comply with the requirements of sections 3654 and 3655, or any other police regulations contained in Chapter XI of the title relating to corporations, and Chapter VIII, Title 3, Part 1, of the Revised Statutes of Ohio, relating to the insurance department of the State, "shall not be deemed to have consented to and shall not be affected by the provisions" of the title relating to corporations.

The judgment of the Supreme Court of Ohio in the case before us

expressly finds that, under the operation of this last provision, the plaintiff in error would not subject its charter to any conditions or modifications by making the statement which it now refuses to submit.

Judgment affirmed.[1]

JOHNSON *v.* GOODYEAR MINING CO.

1899. 127 *California*, 4.[2]

APPEAL from a judgment of the Superior Court of Sierra County. Stanley A. Smith, Judge.

The facts are stated in the opinion.

Frank R. Wehe, for Appellants.

F. D. Soward, for Respondent.

COOPER, C. This action was brought about to recover from the corporation defendant for labor performed by plaintiff and for labor performed by others for defendant corporation, whose claims have been assigned to plaintiff. Judgment was entered in favor of plaintiff and defendants appeal. The case comes here on the judgment-roll. The findings show that the defendant corporation, while engaged in business in Sierra county, California, became indebted to plaintiff and some twenty others, who before the commencement of this action assigned their claims to plaintiff, for labor performed by the month at the instance of defendant corporation in its quartz mine in said county, and the same has not been paid. That four hundred dollars is a reasonable attorney's fee to be allowed to plaintiff for the prosecution of the action. As conclusions of law, the court found that plaintiff was entitled to judgment against defendant corporation for the sum of five thousand and thirty-nine dollars and fifty-seven cents and for four hundred dollars attorney's fees, and that the same is a first lien upon all the property described in the complaint, consisting of certain real estate, mining claims, and personal property, consisting of mining materials, tools, engines, cars, wood, lumber, merchandise for mining, etc., and that all the said property, or so much thereof as might be necessary, be sold to pay the plaintiff's judgment, costs, and attorney's fees. Judgment was accordingly entered. The action was brought to recover monthly wages and attorney's fees, and to have the amount declared a lien upon the property of the defendant corporation under an act approved March 29, 1897. (Stats. 1897, p. 231.) As the constitutionality of the act is the main question in controversy here, it will be necessary to give the

[1] As to the power of the legislature to regulate the business of insurance, see *Com.* v. *Vrooman*, A. D. 1894, 164 Pa. State, 306; *Orient Ins. Co.* v. *Daggs*, A. D. 1899, 172 U. S. 557; *John Hancock M. L. I. Co.* v. *Warren*, A. D. 1901, 181 U. S. 73; *Merchants' Life Ass'n* v. *Yoakum*, A. D. 1899, 98 Fed. Rep. 251. — ED.

[2] Portions of opinion omitted. — ED.

sections of the act herein discussed in full. The sections material are as follows:

"Section 1. Every corporation doing business in this state shall pay, at least once a month, each and every employee employed by such corporation, in transacting or carrying on its business, or in the performance of labor for it, the wages earned by such employee during the preceding month; provided, however, that if at the time of payment any employee shall be absent, or not engaged in his usual employment, he shall be entitled to said payment at any time thereafter upon demand.

"Sec. 2. A violation of any of the provisions of section 1 of this act shall entitle each of the said employees to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney's fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property. An unrecorded deed shall be no defence to such actions.

"Sec. 3. That on the trial of any action against such corporation for a violation of the provisions of this act, such corporation shall not be allowed to set up any defence for a failure to pay monthly any employee engaged in transacting or carrying on its business the wages earned by such employee during the preceding month, other than the fact that such wages were not earned, except a valid assignment of such wages, a setoff or counterclaim against the same, or the absence of such employee from his usual employment at the time of the payment of the wages so earned by him. . . .

"Sec. 5. No corporation shall require, and no employee of such corporation shall make, any agreement to accept wages at longer periods than as provided in this act as a condition of employment.

"Sec. 6. All wages earned by any employee engaged in the service of any corporation in this state shall be paid in lawful moneys of the United States, or in checks negotiable at face value on demand.

"Sec. 7. Any corporation violating any of the provisions of this act shall be subject to a fine not exceeding one hundred dollars, or less than fifty dollars, for each violation, the same to be imposed by any court in this state having jurisdiction of offences in which the penalty does not exceed a fine of one hundred dollars; said fine to be paid, by the judge or magistrate before whom a recovery may be had under the provisions of this act, into the general fund of the treasury of the county in which said conviction may be had."

The plaintiff claims the benefit of the provisions of said act applicable to this case, and the defendants contest the said provisions and every part of said act as being unconstitutional. The statute is said to contravene the following provisions of the constitution of the

state: 1. "No person shall be deprived of life, liberty, or property without due process of law" (Const., art. I, sec. 1, subd. 13); 2. "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens" (Const., art. I, sec. 1, subd. 21); 3. "All laws of a general nature shall have a uniform operation" (Const., art. I, sec. 1, subd. 11); 4. Section 25, article IV, providing that the legislature shall not pass local or special laws in the following cases: "3. Regulating the practice of courts of justice; . . . 24. Authorizing the creation, extension, or impairing of liens; . . . 33. In all other cases where a general law can be made applicable"; 5. Fourteenth amendment to the constitution of the United States: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

. . . . . .

It will be observed that the act in question applies only to two classes of persons: 1. Corporations doing business in this state, and not to corporations of any other class; 2. To laborers performing labor for such corporations. It does not apply to the thousands of laborers who may be employed by individuals or copartnerships in the many and varied industries of the state. The word "corporation" in the act means those artificial persons created and existing under the laws of this or some other state; but the word "corporation," as to the rights of defendants, must be treated as though it means the name of all the individuals who are members of the corporation. It has long been settled that the word "person," within the meaning of the fourteenth amendment to the constitution of the United States, applies to a corporation. (*Douglas* v. *Pacific etc. S. S. Co.*, 4 Cal. 306; *Pasadena* v. *Stimson*, 91 Cal. 248; *Santa Clara County* v. *Southern Pac. R. R.*, 118 U. S. 394; *Pembina Min. Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *Missouri Pac. Ry.* v. *Mackey*, 127 U. S. 205; *Gulf etc. Ry. Co.* v. *Ellis*, 165 U. S. 154.)

The rule is admirably stated in the Railway Tax Cases, 13 Fed. Rep. 743, as follows: "Private corporations are, it is true, artificial persons, but, with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state, they are formed under general laws, and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Any five or more persons may, by voluntary association, form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state requiring for their execution an expenditure of large capital are undertaken by corporations. It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think it is well established by numer-

ous adjudications of the supreme courts of the several states that whenever a provision of the constitution or of a law guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents."

The case was afterward taken to the supreme court of the United States (Railway Tax Cases, 118 U. S. 396), and on the opening of court, before argument, the chief justice said: "The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does." In discussing the provisions of the statute in question it will, therefore, be regarded as settled that the word "corporation" refers to the members who constitute the corporation, and that the rights of a corporation are to measured by the same laws as the rights of a person. The law should be made for all alike, for the rich as well as the poor, for the corporation as well as the laborer. In Cooley on Constitutional Limitations, sixth edition, page 483, it is said: "But every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." In *Wally* v. *Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511, it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law, the mass of the community and those who made the law by another, whereas the like general law affecting the whole community equally could not have been passed." Applying these principles to this act, it is clearly unconstitutional. It gives a first lien to laborers for the amount due them from corporations doing business in this state upon all the real and personal property of such corporations, and does not even require any description of the property or notice in any manner in order to make such lien valid. It seems to give the laborer the right to an attachment against the property of the corporation without requiring him to make the affidavit

and file the undertaking required of all other persons in order to procure such attachment. It does not give this lien to any other class of laborers. The thousands of laborers for individuals or copartnerships in the like employment do not have the benefit of it. The laborer toiling at the same kind of labor, felling the forest, tilling the soil, or digging in the bowels of the earth, has no such lien if he is not working for a corporation doing business in this state. The lien attaches to the property of such corporation, but not to the property of an individual under precisely the same circumstances. Under general law, liens are given to all mechanics, artisans, laborers, or materialmen, and against all persons or corporations. Under the present statute, a lien is given to laborers performing labor for the particular corporations named. All other persons in the state, after obtaining an ordinary money judgment, must enforce it by the writ of execution, but laborers for such corporations under this statute have the right to have the court declare the amount found due them a lien on all the property of the corporation, which shall take preference over all other liens except recorded mortgages and deeds of trust. The grocer who, perhaps, has furnished the corporation the food with which the laborer has fed his wife and children may have attached the property of the corporation for the purpose of securing himself, but the laborer's lien by the mighty hand of the statute at once sweeps it away. The materialman or contractor who has furnished the material for or constructed a building for the corporation, and who has filed his notice of lien as provided in the Code of Civil Procedure, and who may have secured a judgment thereon, must stand by and see his lien destroyed by a decree of court in favor of laborers who performed labor for the corporation since his lien attached. The judgment creditor who has procured a judgment and had it regularly docketed, and who is resting securely under the provisions of the Code of Civil Procedure of this state making his judgment a lien upon all the real estate of the judgment debtor, is surprised to find his lien destroyed by a decree in favor of one who has performed labor for the corporation long since his lien attached. The corporation may have delivered a large amount of personal property by way of pledge to secure a loan, and the money may have been used in paying the laborers employed by the corporation, and yet, under this statute, the court must declare the amount due laborers a prior lien as against the pledgee who has actual possession of the property pledged. The statute gives the laborer a right, in case he recovers judgment, to recover attorneys' fees, which become a part of the judgment. No other class of laborers or persons are given the right to recover attorneys' fees except by virtue of a contract or by virtue of a general statute. The corporation is prohibited from setting up any defence to the action except some two or three. Matters which might be pleaded as a defence by all other persons in the state are not allowed to be so pleaded by the corporation. If the legislature could deprive the corporation of some of the defences which other litigants on like terms are allowed

it could, by a Draconian edict, deprive it of all of them and say at once that the corporation should make no defence whatever to the action. The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over twenty-one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so. Not only this, but the corporation shall be subject to a fine of not less than fifty dollars for each violation of the statute. A corporation employing a thousand men and sued by each could not defend the suits without being limited in its defences to those named in the statute, and being subject to a reasonable attorney's fee in each case. In case it made a contract with the thousand men by which they agreed to work for it three months for one hundred dollars each they could bring suit and recover before the end of the three months and each recover an attorney's fee, making a thousand attorney's fees, and the corporation would be subject to one thousand fines of one hundred dollars each, making the modest sum of one hundred thousand dollars in fines, or perhaps the magistrate might in his discretion make the fine fifty dollars in each case and thus reduce it to fifty thousand dollars. We might enumerate many other infirmities in the statute, but the above are sufficient to destroy it. It is probably unnecessary in this opinion to discuss separately the constitutional objections herein briefly pointed out.

[The learned Judge here cited and commented upon various authorities.]

It is claimed that corporations are a class and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. While this is true, yet the classification must be founded upon differences either defined by the constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation. (*Darcy* v. *Mayor etc.*, 104 Cal. 645; *State* v. *Hammer*, 42 N. J. L. 439; Cooley on Constitutional Limitations, 6th ed., 484.) Arbitrary selection can never be justified by calling it classification. (*Gulf etc. Ry. Co.* v. *Ellis*, 165 U. S. 159.) In this case there can be no reason why a corporation doing business in this state should have its

property subjected to a lien, unless the property of other persons in the state under like circumstances is subject to the same kind of a lien, or why such corporations should be prohibited from making defences which all other persons in the state may make, or why such corporations should pay attorneys' fees or fines in an ordinary action at law while all other persons under like circumstances are exempt from such attorneys' fees and fines, or why such corporation cannot create valid liens upon its property other than by a deed or mortgage duly recorded while all other persons in the state may do so, or why such corporations shall be denied the privilege of making a contract as to the manner of payment of its employees while all other persons in the state who are over twenty-one years of age and not incompetent may do so, or why laborers cannot make a valid contract as to the time when their wages shall become due, or the kind of property or money in which they shall be paid. It is said that corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation and while it exists, deprive it of the rights guaranteed to it by the federal constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws. (*Maine etc. R. R. Co.* v. *Maine*, 96 U. S. 499; *Sinking Fund Cases*, 96 U. S. 700; *Railroad Tax Cases*, 13 Fed. Rep. 754, 755; *Detroit* v. *Detroit etc. Plank Road Co.*, 43 Mich. 140–147.)

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That portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, should be affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and to have a commissioner appointed to sell the property, should be reversed.

HAYNES, C., and CHIPMAN, C., concurred.

For the reasons given in the foregoing opinion that portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, is affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and to have a commissioner appointed to sell the property, is reversed.

HARRISON, J., GAROUTTE, J., VAN DYKE, J.

Hearing in Bank denied.[1]

[1] The statute here held unconstitutional was declared valid in *Skinner* v. *Garnett Gold Mining Co.*, A. D. 1899, 96 Federal Reporter, 735 (commented upon in one of the omitted

NEIL, J., IN STATE *v.* LEBANON & W. TURNPIKE CO.

1900. *Court of Chancery Appeals of Tennessee.* 61 *Southwestern Reporter,* 1096, p. 1097.

NEIL, J.

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It is next insisted that the provisions of the act of 1849–50 are valid as an exercise of the police power. The defendant, on the other hand, insists that this act is void because it impairs the obligation of the contract entered into by the state and the defendant in the charter and the amendments, and by the acceptance of the acts by the defendant. At this late day there is no need of the citation of authority to support the proposition that a charter is a contract, and that its binding force cannot be impaired by subsequent legislation not assented to by the corporation. It is true, however, that under the police power the legislature may enact regulations for the exercise of the franchises of the company, looking to the protection of the public health, safety, and convenience. The state, however, cannot, under the guise of regulating a corporation, take its franchises from it; nor can it, by way of regulation of the exercise of the franchises of the corporation, compel it to donate to the county or the state a sum of money, or to undertake public improvements beyond its line. These principles, we think, cannot be controverted. Now, to apply them to the present case, the act of 1849–50 required of the defendant, as a condition of the exercise of its franchises, that it should build beyond the end of its road a bridge across Stone's river. This requirement, we think, if enforced, would be but a form of confiscation of the property of defendant. It results that the decree of the chancellor must be affirmed, with the costs of this court and of the court below.

portions of the opinion in *Johnson* v. *Goodyear Mining Co.*). While some of the views expressed in the *Skinner* case are irreconcilable with the opinion in the *Johnson* case, it should be noted that *one* of the grounds relied on by the court in the *Skinner* case is the provision in the Constitution of California, providing that: "All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

It should also be noted that, in some other cases where general expressions are used seemingly at entire variance with the reasoning in the *Johnson* case, yet the decision is really based, in whole or in part, upon the existence of a reserved legislative power to amend the charter. For instance, in *Leep* v. *St. Louis &c. R. Co.*, A. D. 1894, 58 Arkansas, 407, a majority of the court *held*, that a statute regulating the payment of wages, although it would be invalid as to individual employers, was valid as applied to corporate employers; the *ratio decidendi* being the existence of a reserved legislative power to alter or repeal the laws under which corporations are formed. BATTLE, J., said (pp. 427, 428): "But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, expressly or as incidental to their existence; and these may be modified or diminished by amendment or extinguished by the repeal of the charters." — ED.

VALENTINE, J., IN LAND GRANT RAILWAY *v.* COMMISSIONERS OF COFFEY COUNTY.

1870. 6 *Kansas*, 245.

THE defendants deny that the plaintiffs have any legal corporate existence in Kansas or elsewhere; and deny particularly that they have any legal right to engage in any such business in Kansas as they have engaged in on such a grand scale for the last two years.

It is certainly with no feeling of hostility towards any one that we investigate the questions. They are thrust upon us without our con-

v. Van Santvoord, 34 N. Y. 208; Bank *v.* Hall, 35 Oh. St. 158; Canadian Pac. Ry. *v.* W. U. Tel. Co., 17 Can. 151.

A foreign corporation may be expressly forbidden by statute to do an act; as by a general statute applying to all corporations, foreign or domestic. P. *v.* Howard, 50 Mich. 239; Bard *v.* Poole, 12 N. Y. 495. So it may not do an act for doing which a special franchise is required. Dodge *v.* Council Bluffs, 57 Ia. 560; Middle Bridge Co. *v.* Marks, 26 Me. 326. So it may not do any act which is against the public policy of the State: American Col. Soc. *v.* Gartrell, 23 Ga. 448; but in the absence of legislation forbidding the act, the case must be a very clear one before the court can say that the act is against public policy. Cowell *v.* Springs Co., 100 U. S. 59; Stevens *v.* Pratt, 101 Ill. 206; Thompson *v.* Waters, 25 Mich. 214. In the last case, CHRISTIANCY, C. J., said: "The legislature are the proper representatives of the public interest, and having the exclusive power to determine what shall be the public policy of the State, if they have chosen to make no enactment upon the subject it is natural to infer they omitted to do so because they thought it unnecessary and that the generally recognized principles would be sufficient for such cases." The fact that the legislature has itself created no corporation with power to do the act is not enough to prove that it is against public policy for a foreign corporation to do it. Cowell *v.* Springs Co., 100 U. S. 55; Deringer *v.* Deringer, 5 Houst. 416; but see Empire Mills *v.* Alston Grocery Co., 4 Wills. (Tex.) 346, 15 S. W. 505. In acting within the State, the foreign corporation is, of course, at all times subject to the regulations and to the general laws of the State. U. S. *v.* Fox, 94 U. S. 315; McGregor *v.* Erie Ry., 35 N. J. L. 115; Southern L. Ins. & Tr. Co. *v.* Packer, 17 N. Y. 51; P. *v.* Coleman, 135 N. Y. 231. Since a foreign corporation may be excluded from a State altogether, it may be admitted upon terms, as, for instance, that it will submit to the jurisdiction of the local courts. Paul *v.* Virginia, 8 Wall. 168; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727.

The mere fact that the corporation was formed in the foreign State by citizens of the domestic State, to do business solely in the latter State, does not make it incapable of acting. Bangleman *v.* National W. W. Co., 46 Fed. 4; Lancaster *v.* Amsterdam Improvement Co., 140 N. Y. 576, *infra;* Hanna *v.* International Petroleum Co., 23 Oh. St. 622.

The corporation can do no act which it is not empowered to do by the State of its charter; no act of the foreign State, permitting such an act to be done by the corporation within its territories, can confer the power to do it. St. Louis V. & T. H. R. R. *v.* T. H. & I. R. R., 145 U. S. 393. As its powers are created, so the continuance of them is dependent on the will of the State of charter (subject to possible constitutional limitations). Therefore the existence of a corporation is determined solely by the law of the State of charter: Importing and Exporting Co. *v.* Locke, 50 Ala. 332; and if by that law the corporation has come to an end, it ceases to exist everywhere: Remington *v.* Samana Bay Co., 140 Mass. 494. In that case a revolutionary government had declared the charter void. It was argued that a foreign state should not recognize the act of the revolutionary government as putting an end to the corporation; but

HOLMES, J., said: "Would it not be a most extraordinary spectacle if, when a *de facto* government . . . had made a decree dissolving a corporation, and its decree had been accepted as valid by all succeeding governments of the country having exclusive power and jurisdiction over the matter, the courts of another State should undertake to assert that the corporation existed under the laws of that country, in spite of their repudiation and denial? . . . That fiction or artificial creation is wholly within the power of its creator, and persons who deal with it must be taken to understand that it is so." — ED.

sent. The plaintiffs bring the case here, and these questions necessarily arise in the case at the very threshold of its examination, and we could not well, if we would, escape from their investigation.

It must be admitted that the plaintiffs have been of great benefit to the people of Kansas. They have vastly increased the wealth of the State. They have expended millions of money in enterprises of incalculable benefit to the public. They have built and are building within this State, long lines of railroads, instruments of commerce and intercourse essential to the prosperity of any people, and a species of improvement without which civilization itself could no longer progress.

But let us turn to the plaintiff's Pennsylvania charter. "It is well settled that while a nation possesses an exclusive jurisdiction within its own boundaries, neither constitutions nor statutes have any intrinsic force, *ex proprio vigore*, beyond the territory of the sovereignty which enacts them, and the respect which is paid to them elsewhere depends on *comity* alone." (Sedg. on Stat. and Cons. Law, 69.) This is a maxim, self-evident, and universal in its application, applying as well between the different States of this Union as between foreign States; and needs only to be stated to be assented to. It would be absurd in the extreme to suppose that the laws of any State or country could have any force or operation beyond the boundaries of the State enacting them. "A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." (4 Wheat. 636.) It "can have no legal existence out of the boundaries of the sovereignty by which it is created." "It exists only in contemplation of law and by force of the law; and when that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." — (13 Peters, 520, 588, 589.)

"It is a rule of law that a private corporation whose charter has been granted by one State cannot hold meetings and pass votes in another State." — (14 N. J., 380, 383.) "Corporate acts performed by the body of the corporation while sitting out of the State which creates it, are void and of no effect." — (20 Ind., 292, 297. And see 27 Me., 509, 524.)

A corporation, in order to have any legal or valid existence, must have a home, a domicile, a principal place of doing business, within the boundaries of the State which creates it. It may send agents into other States to do business, but it cannot migrate in a body. If it attemps to migrate in a body, to go beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements, and the persons who comprise it become only individuals. And even where a corporation has a legal and valid existence in its

own State, the only recognition that other States will give to it is such as the rules of courtesy and comity between States require.

Under the rules of comity, a foreign corporation may by its agents usually exercise in another State all the powers which it could exercise in its own State, which are not repugnant to the laws and institutions, nor prejudicial to the interests of such other State. And comity would perhaps allow a foreign corporation to exercise in another State, powers beyond what it could exercise in its own State, which were absolutely necessary to the exercise of its legitimate functions in its own State. For instance: Suppose that grapes and wine could not be produced in the State of Pennsylvania; and suppose that the State of Pennsylvania desired to charter a corporation to furnish grapes and wine from the States of New York and California to the people of the State of Pennsylvania. The States of New York and California might, through comity, allow said corporation to hold, occupy and operate vineyards in their respective States for that purpose. But this is certainly as far as any kind of courtesy or comity would go. No rule of comity will allow one State to spawn corporations, and send them forth into other States to be nurtured, and do business there, when said first mentioned State will not allow them to do business within its own boundaries.

The first section of the plaintiff's charter says that this corporation, (the New York and California Vineyard Company,) may do business any where *except in the State of Pennsylvania* — which is equivalent to saying that it shall not do business in the State of Pennsylvania; and the fourth section says that it shall establish their offices *where their business is located*, which is equivalent to saying that they shall not establish any office in the State of Pennsylvania. From the only territory in the whole world, over which the State of Pennsylvania has any jurisdiction or control, and in which it could authorize a corporation to have an office, or to do business, it excludes this corporation; and the attempt on the part of the State of Pennsylvania to authorize this corporation to have an office, or to do business anywhere else except in the State of Pennsylvania, is *ultrâ vires*, illegal, and void. The truth is, that while this supposed corporation was originally organized for the whole United States, except the State of Pennsylvania, and afterwards by its amended charter of February 17th, 1870, for the whole world except Pennsylvania, it had no legal or valid existence anywhere upon the face of the earth. At the very creation of this supposed corporation its creator spurned it from the land of its birth, as illegitimate, and unworthy of a home among its kindred, and sent it forth a wanderer on foreign soil. Is the State of Kansas bound by any kind of courtesy, or comity, or friendship, or kindness to Pennsylvania, to treat this corporation better than its creator (the State of Pennsylvania) has done? It can hardly be supposed so, when we come to see how carefully our own constitution has guarded the creation of corporations in our own state.

LANCASTER *v.* AMSTERDAM IMPROVEMENT CO.

1894. 140 *New York*, 576.

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 13, 1893, which directed judgment in favor of plaintiff upon a case submitted under section 1279 of the Code of Civil Procedure.

This was a submission of a controversy to the General Term in the first department upon agreed facts.

The Amsterdam Improvement Company was incorporated under the laws of the state of New Jersey, in May, 1891, by five persons; of whom one only was a resident of that state, the others being residents of this state. Its certificate of incorporation, filed that day, contained the following article: —

"*Second.* That the places in this state, where the business of such company is to be conducted, are Jersey City and the city of Hoboken, in the county of Hudson. The principal part of the business of said company within this state is to be transacted at Jersey City, in the county of Hudson, and the places out of this state where the same is to be conducted and where the company proposes to carry on operations are the cities of New York and Brooklyn, in the state of New York; and that the objects for which said company is formed are the purchase and sale of real property, both improved and unimproved, the improvement of such property as may be purchased, and which, when purchased, is unimproved, the exchange of property for other property, the lending of moneys upon first and second mortgages, secured by bonds, and the purchase and sale, by assignment or otherwise, of such mortgages and bonds. The portion of the business of said company which is to be carried on out of this state in the said cities of New York and Brooklyn will be such as will come under the head of the objects for which this company is formed. The principal office or place of business of said company, out of this state, is the city of New York, in the county and state of New York."

On December 21st, 1892, the secretary of state of the state of New York issued a certificate, of which the following is a copy:

"STATE OF NEW YORK.
"*Office of the Secretary of State, Albany.*

"It is hereby certified that the Amsterdam Improvement Company, which appears from the papers filed in this office on the twenty-first day of December, 1892, to be a foreign stock corporation, organized and existing under the laws of the state of New Jersey, has complied with all the requirements of law to authorize it to do business in this state, and that the business of such corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state, for such or similar business."

The statute under which this company was incorporated provided that: "It shall be lawful for three or more persons to associate themselves into a company to carry on any kind of manufacturing, mining, chemical, trading, or agricultural business, agricultural fairs and exhibitions for the encouragement of competition in agriculture, horticulture, breed of stock, and development of speed in horses, the transportation of goods, merchandise, or passengers upon land or water, inland navigation, the building of houses, vessels, wharves, or docks, or other mechanical business, the reclamation and improvement of submerged lands, the improvement and sale of lands," etc.

This statute also provided that corporations shall have the power "To hold, purchase, and convey such real and personal property as the purposes of the corporation shall require, not exceeding the amount limited in its charter, and all other real estate which shall have been *bona fide* mortgaged to the said company by way of security, or conveyed to them in satisfaction of debts previously contracted in the course of dealings, or purchased at sales upon judgment or decree which shall be obtained for such debts."

Other provisions authorized a company organized under the statute to carry on a part of its business, and to have offices out of the state, and that "they may hold, purchase, and convey real and personal property out of the state, the same as if such real and personal property were situated in the state of New Jersey, provided that the certificate of organization shall state," etc., etc. Another provision authorized any New Jersey corporation, incorporated under any general or special act, to conduct its business outside the state.

May 23d, 1891, Arthur P. Smith was the owner of a lot of vacant and unimproved land in the city of New York, which, by a deed dated that day and duly recorded May 25th, 1891, he conveyed to the defendant. On the 15th of January, 1893, the plaintiff and the defendant entered into a written contract whereby they agreed to exchange said lot of land for another lot of land owned by the plaintiff. The land of the plaintiff was valued at $72,000, and the land of the defendant at $49,500, and the difference, $18,500, the defendant agreed to pay to the plaintiff at the times and in the manner specified in the contract. It was agreed that the deeds should be exchanged at a place named on or before February 15th, 1893. Pursuant to said contract the defendant executed a deed in due form by which it assumed to convey the premises to the plaintiff.

It is conceded that the defendant has done no business in the state of New Jersey, and that the only business or transactions in which it has been engaged since its organization have been carried on in the city and county of New York.

The following question was submitted to the General Term: "Whether said defendant, the Amsterdam Improvement Company, possessed, and has conveyed to Frederick J. Lancaster, the plaintiff herein, a good and sufficient title to the premises described in said

contract and deed." That court has adjudged that the defendant's deed did not convey to the plaintiff a good title, and that its title was subject to the right, title, and interest of the people of the state, whose title was, at the time of the execution and delivery of the deed, superior and prior to that of the defendant.

Thomas P. Bassford, for plaintiff.

Louis Marshall and *Hugo S. Mack*, for defendant.[1]

GRAY, J. Before approaching the discussion of the principal question in this case, certain questions of subordinate importance may be disposed of, which have been raised upon the argument. One of them relates to the right of this corporation to recognition in our courts, as affected by the fact that the incorporators are, with one exception, citizens and residents of this state. Whatever inferences can be drawn as to the motives which took them into a foreign jurisdiction to organize a corporation under its laws, I agree with the General Term that any such question has been once and for all settled by our recent decision in the case of *Demarest* v. *Flack* (128 N. Y. 205). It appeared in that case that citizens of this state incorporated under the laws of West Virginia to carry on a certain business, with the principal office of the company in New York city, where only it had been conducting its operations. It was claimed that these facts invalidated the corporation, and that there was a manifest evasion of, and fraud upon, the laws of the state. But it was held that they constituted no reason for refusing recognition to the corporation; that there was no essential difference between a corporation formed under the laws of a foreign state, the members of which were its own citizens, and one so formed, the members of which were citizens of our own state. If our citizens are attracted to other jurisdictions for purposes of incorporation, because of more favorable corporation or taxation laws, I cannot see in that fact, however, and in whatever sense, to be deplored, any reason that they should be prevented from employing here the corporate capital in the various channels of trade or manufacture. That, as it seems to me, would be a rather hurtful policy and one not to be attributed to the state.

Another question relates to the regularity of the proceedings for the incorporation of the defendant company under the laws of the state of New Jersey. I am unable to perceive any defect therein. I should say there had been a compliance with its statutes. But if there could be pointed out some irregularity, it could not be made the subject of an objection to the defendant's title. It was a corporation *de facto*. Its incorporators had filed their certificate of incorporation, as required by the laws of New Jersey, and a certificate had been filed in the office of the secretary of state of this state, as required by our laws of a foreign corporation. It was exercising a franchise attempted to be conferred upon it by the laws of New Jersey, and any question affecting its right to transact business, because of alleged irregularities

[1] Arguments omitted. — ED.

in organization, is a matter for the government of that state to inquire into. It was said in *Methodist Epis. Church* v. *Pickett* (19 N. Y. 482), with respect to the capacity of corporations to act, that "the rule established by law, as well as by reason, is that parties, recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization, or any subsequent abuse of their powers, not connected with such dealing. As long as they are overlooked, or tolerated by the state, it is not for individuals to call them in question." That this principle is equally applicable to foreign corporations *de facto* was held in *Bank of Toledo* v. *International Bank* (21 N. Y. 542). With respect to the question of whether the laws of the state of New Jersey authorize the kind of business which this company was organized and proposes to transact, I think that the provisions of the statute for the formation of corporations, to which our attention is directed, are broad enough in their scope to comprehend the objects of this incorporation. They authorize incorporations for the purpose of the improvement and sale of lands. With such an authorization and, as a corporation, being vested under those laws with the authority to hold, purchase, and convey such real and personal estate, as the purposes of the corporation shall require, there is ample support for a construction that this company may deal in the purchase and sale of real estate. But, if any doubt might be entertained upon the correctness of our construction of this foreign statute, I do not think the doubt affects the question here. If to engage in the business of buying and of selling real property is to act in excess of the powers conferred upon the corporation by the statute of New Jersey, it is for that government to inquire into the exercise by its creature of corporate powers. It is not a question which the party dealing with it can raise. As a corporation *de facto*, possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred; and unless in the laws of this state we are able to find a prohibition, expressed herein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed.

The principal question for our consideration is one of great importance; for upon its decision not only depend large interests, but a judicial definition of state policy. That question may be thus succinctly stated: Under our laws, can a foreign corporation, incorporated for the purpose of dealing in the purchase and sale of real property, come into this state and transact here such kind of corporate business? The General Term put the question in somewhat different form: Whether it may "purchase and hold lands within this state which are not necessary for its business and which have not been acquired in securing the payment due to it." That is hardly exact, as applied to the case of this corporation. As I have shaped it, the question is certainly made broad enough.

The opinion of the General Term was delivered by Mr. Justice FOLLETT, whose opinions are entitled to the highest respect, and he negatives the proposition embodied in the question; upon the ground, in substance, that from certain general statutes of this state, which relate to the right of foreign corporations to purchase, or acquire, and to convey real property, and from numerous special acts, passed to authorize them to acquire lands, it is to be inferred that "it is contrary to the policy of this state to permit such corporations to take, hold, and convey lands in this state, without being specially authorized so to do."

[The learned judge examined the statutes of the state, and held that they expressed no policy adverse to the defendant's business.]

If we turn, only, to decisions of this court, in our investigation of what has been the public policy of this state towards foreign corporations, we find them interpreting and applying the principle of state comity in the broadest spirit. In *People* v. *Fire Association* (92 N. Y. 311) it was observed that "where a state does not forbid, or its public policy, as evidenced by its laws, is not infringed, a foreign corporation may transact business within its boundaries and be entitled to the protection of its laws." In *Hollis* v. *Drew Seminary* (95 N. Y. 166) it was held that "unless the legislature forbids, they" (foreign corporations) "can come here as freely as natural persons and exercise here all the powers conferred upon them by their charter, subject to the limitation imposed upon natural persons, that is, they can do no acts in violation of our laws or of our public policy. But, unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations can do." This decision was in line with the early case in this court of *Bard* v. *Poole* (12 N. Y. 495), in which the discussion turned upon the question of the right of a corporation of the state of Maryland to make loans, secured by mortgages upon real estate within this state. Judge DENIO said, in the opinion in that case, that "any of the states of the Union may, as this and several of the other states have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business within its jurisdiction. But, in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law and not inconsistent with the policy of the state as indicated by the general scope of its laws or Constitution, corporations are permitted by the comity of nations to make contracts and transact business in other states than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other states. It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter to make, and it must also be one which would be valid if made at the same place by a natural person, not a resident of that state."

It seems to me to be very clear, upon examination of our laws and